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In The Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Charles.McGuigan@state.sd.us

Counsel for Petitioners Dennis Daugaard, Governor of South Dakota, and Marty J. Jackley, Attorney General of South Dakota

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Act of 1894 disestablished the Yankton Sioux Reservation.

PARTIES

The caption of the case contains the names of all the parties to the proceeding, except Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission; and Southern Missouri Waste Management District. The Yankton Sioux Tribe represents itself and its individual members.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on May 6, 2010, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The Amended Opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) (*Podhradsky IV*) and is reprinted in the Appendix (App.) at 1-51. The Eighth Circuit also issued an Order on Petitions for Rehearing, reported at *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) (*Podhradsky III*), and reprinted at App. 52-70. The opinion of the Eighth Circuit, which was later amended, is reported at *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) (*Podhradsky II*) and is reprinted at App. 71-121. The Memorandum Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007) (*Podhradsky I*) and is reprinted at App. 122-63. The earlier opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (*Gaffey II*) and is reprinted at App. 199-249. The Memorandum

Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998) (*Gaffey I*) and is reprinted at App. 250-320.

JURISDICTION

The judgment of the Eighth Circuit was entered on May 6, 2010. The Eighth Circuit denied timely Petitions for rehearing and suggestions for rehearing en banc on September 20, 2010. App. 321-22. The Honorable Samuel Alito, Associate Justice, on December 14, 2010, extended the time for the filing of Petitions for Writ of Certiorari to January 18, 2010. App. 323. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at App. 324-36.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at App. 337-51.

The statute defining "Indian country" at 18 U.S.C. § 1151 states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian

> country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

INTRODUCTION

More than twelve years ago, this Court granted certiorari to resolve a conflict between the South Dakota Supreme Court and the Eighth Circuit as to whether an 1894 statute that ratified an agreement between the Yankton Sioux Tribe and the United States diminished or disestablished the Yankton Sioux Reservation. After briefing and argument, the Court concluded that the Act's "'cession' and 'sum certain'" language is "'precisely suited' to terminating reservation status." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). The Court accordingly held that the Act was "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." *Id.* at 345. The Court expressly left open, however,

the question "whether Congress disestablished the reservation altogether[.]" *Id.* at 358. The next year, the South Dakota Supreme Court and the Eighth Circuit issued opinions on that very issue. Each court recognized that the 1858 boundaries were extinguished but each reached conflicting results on the issue of disestablishment, with the South Dakota Supreme Court finding the reservation disestablished and the Eighth Circuit finding it still in existence. Petitions for certiorari were filed by the State, local governments and Tribe, but the United States resisted, essentially telling this Court that the Petitions were premature because of an additional remand. The Petitions were denied. *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

The conflict intensified. Following further litigation, the Eighth Circuit affirmed the existence of a permanent "reservation" of 37,600 acres and declared it to consist of more than 200 noncontiguous parcels of allotted land, land taken into trust under the Indian Reorganization Act (25 U.S.C. § 465), and agency land.[1] Each parcel is individually encompassed by § 1151(a) "reservation" boundaries and constitutes a "mini-reservation" within the extinguished boundaries. The designation of allotted and trust lands as § 1151(a) "reservation" is especially

[1] The State's analysis of 2007 Ex 209, the Map at App 352, reveals that the number of parcels of land, or clusters of such parcels, designated by *Podhradsky IV* as "reservation," which did not in any way touch any other such parcels, is approximately 200

problematic given the finding of the Eighth Circuit that, after the enactment of § 1151 in 1948, allotted and trust lands which fell within extinguished 1858 reservation boundaries retain their status as "reservation" even after they are patented and transferred to non-Indians. As a result, an additional 5,900 acres of land held today in fee by non-Indians within the extinguished boundaries may now be claimed as "reservation." The proceedings on remand thus have confirmed the breadth of the conflict and far-reaching implications of the Eighth Circuit's ruling, and review by this Court is urgently needed to end this untenable situation.

STATEMENT OF THE CASE

A. History of the Reservation.

This case once again brings to this Court's attention the facts related to the creation and cession of the Yankton Reservation. *See Yankton Sioux Tribe*, 522 U.S. at 333-40. In 1858, the United States entered into a treaty with the Yankton Sioux Tribe in which the Tribe "ceded" substantial lands in exchange for the United States' "pledge[ ] to protect the Yankton Tribe in their 'quiet and peaceable possession' of this reservation," which was later surveyed and determined to encompass 430,405 acres. *Id.* at 334.[2]

[2] The 1858 Treaty indicated that the size of the reservation was 400,000 acres; after the 1858 Treaty was ratified, the

(Continued on following page)

Subsequently, under "pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership," Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (commonly known as the Dawes Act). *Yankton Sioux Tribe*, 522 U.S. at 335. Pursuant to that Act, "each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years." *Id.* at 336.

Allotment proceeded quickly. By 1890, 167,325 acres had been allotted under the Dawes Act; 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795. *Yankton Sioux Tribe*, 522 U.S. at 336. This left a surplus of approximately 168,000 acres of unallotted lands. *Id.* In 1892, Congress enacted 27 Stat. 120, 137, which authorized funds "to enable the Secretary" of the Interior in his discretion to "negotiate with any Indians for the surrender of portions of their respective reservations." In the same year, the United States appointed the Yankton Indian Commission. 1998 JA 97. Negotiations followed during which the parties

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United States performed a survey and determined that it actually contained 430,405 acres. 1995 Transcript 40, 221-22, 255. The term "1995 Transcript" refers to the transcript of the original trial of this matter on April 3-7, 1995. The term "1998 Transcript" refers to the evidentiary hearing, on May 20, 1998, in the litigation following this Court's remand. The term "1998 JA" refers to the Joint Appendix filed in the Eighth Circuit in 1998. The term "2007 Ex." refers to exhibits at the 2007 trial. The term "2008 SA" refers to the State's Appendix in the Eighth Circuit in 2008.

discussed the contemporaneous Lake Traverse cession in South Dakota, which disestablished that reservation, along with the pending Yankton Agreement, not distinguishing the two except for the fact that larger payments were proposed in the Yankton Agreement. 1998 JA 149, 163, 167, 177.

The agreement reached between the Yankton tribal members and the United States provided, in Article I, that the Tribe would "cede, sell, relinquish, and convey to the United States . . . all the unallotted lands on the reservation." Agreement, App. 339; *Yankton Sioux Tribe*, 522 U.S. at 338. In Article II, the United States agreed to pay the Tribe $600,000, or $3.60 an acre. *Id.* As a result of the 1894 Act, the Tribe retained no land for itself in common. *Gaffey II*, App. 229-30; 1998 Transcript 45-46. Tribal members disposed of most of their allotments in a fairly short period of time. By 1930, the Yankton Indians owned only 43,358 acres. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of initial trial in this case in 1995, at least 88 percent or 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians. *See Yankton Sioux Tribe*, 522 U.S. at 339. *See also* App. 352 (Map).

Among the lands "ceded" to the United States for payment in 1894 were lands described in Article VIII as "occupied by the United States for agency, schools, and other purposes" (commonly known as "agency" lands). Agreement, App. 342-43. Article VIII reserved the ceded agency lands "from sale to settlers

until they are no longer required for such purposes." *Id.*

In 1929, Congress provided that the ceded agency lands could be transferred to the Tribe, but only "when they are no longer required for agency, schools, or other purposes." Act of February 13, 1929, ch. 183, 45 Stat. 1167. In a 1934 opinion, the Solicitor of the Department of the Interior held that the United States had "permanently discontinued" the use of the lands and that they were "no longer needed for any of such purposes." 1998 JA 572. He therefore held that the lands, which were thought to constitute approximately 1,000 acres,[3] belonged to the Yankton Sioux Tribe. *Id.*

B. The First Round of Litigation.

The dispute over the status of the reservation commenced after the Southern Missouri Recycling and Waste Management District acquired a site for a municipal solid waste facility on land ceded in the 1894 Act. The Waste District sought a state permit for the landfill. After state courts rejected environmental challenges, the Yankton Tribe filed suit in the United States District Court for the District of South Dakota seeking to enjoin construction of the landfill. The Waste District joined South Dakota as a third party so that the State could defend its jurisdiction to issue

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[3] The actual amount of agency land was probably about 1,200 acres

the permit. The district court declined to enjoin the landfill project, but ruled that the 1894 Act did not disestablish or diminish the Reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878, 891 (D.S.D. 1995). A divided panel of the Eighth Circuit affirmed, relying principally (as had the district court) upon the "savings clause" of Article XVIII of the Agreement. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1447-48 (8th Cir. 1996). This Court granted certiorari and reversed. *Yankton Sioux Tribe*, 522 U.S. 329.

The Court based its decision primarily on the plain language of the 1894 statute. In particular, the Court found that Articles I and II of the Agreement contained "'cession' and 'sum certain' language [which] is 'precisely suited' to terminating reservation status." *Id.* at 344. The Court cited *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) as support for that conclusion and continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* . . . and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

Id. at 344 (citing *DeCoteau*, 420 U.S. at 445). The Court rejected the holding of the district court that the Article XVIII savings clause should be given decisive effect. *Yankton Sioux Tribe*, 522 U.S. at 345-49.

Although earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished, the Court chose not to determine whether the Reservation was "disestablished . . . altogether." *Id.* at 358. Observing that it "need not determine" that issue to decide the case before it, the Court elected to "limit [its] holding to the narrow question presented." *Id.* The Court did so after noting "conflicting understandings about the status of the reservation" and alluding to the Tribe's ownership of "land in common." *Id.* The Court therefore reversed and remanded the case for further action. *Id.*

C. The Second Round of Litigation.

1. On remand, the district court consolidated the Tribe's initial action with a declaratory judgment action brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on originally allotted land within the original reservation boundaries. The United States joined as a party supporting the Tribe. After an evidentiary hearing, the district court held that the original boundaries of the Reservation remained intact. *Gaffey I*, App. 318-20. Further, the district court found that all lands within those original boundaries that were not ceded in the 1894 Act, i.e., all allotted lands, remained part of the reservation (*Gaffey I*, App. 318-19), even though roughly 88 percent of the allotted lands had been transferred to non-Indians. *Yankton Sioux Tribe*, 522 U.S. at 339. The district court also held that the "agency lands" which had been ceded by the Tribe to

the United States under Article VIII retained reservation status. *Gaffey I*, App. 319.

2. Reversing the district court in part, the Eighth Circuit held that the boundaries of the 1858 reservation were not maintained. *Gaffey II*, App. 248-49. The court further held allotted land which had left Indian ownership was no longer part of the Reservation or "Indian country" of any kind: "we hold that the [reservation] . . . has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II*, App. 247. However, the Eighth Circuit affirmed the district court's holding that the Reservation had not been "disestablished," finding the Reservation consisted of certain former "agency lands" later conveyed to the Tribe and, potentially, an unknown quantity of "trust" land. *Gaffey II*, App. 249.

In holding that the 1894 Act did not disestablish the Yankton Reservation, the Eighth Circuit began, necessarily, at attempting to distinguish *DeCoteau*, in which this Court held that an agreement which ceded all of the tribe's unallotted lands for a sum certain disestablished that reservation. *See* discussion at II.A, *infra*. It found that the Yankton Agreement's "cession and sum certain" language was immaterial because it explicitly referred only to the ceded lands. *Gaffey II*, App. 237. Having brushed past the very language and rationale that controlled *DeCoteau* and *Yankton Sioux Tribe*, the court turned to the bare negotiating history for guidance, determining that the reservation had not been disestablished, and that

the 1,000 acres of agency land ceded to the United States in 1894 and conveyed to the Tribe by virtue of the 1929 Act remained "reservation." *Id.* at App. 249.

The Eighth Circuit left to the "district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It thus directed the district court to initially determine which, if any, of the allotted lands then held in trust and other lands taken into trust under various statutes, including the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, were "reservation" under § 1151(a).[4]

Petitions for rehearing were filed by the State, Charles Mix County, the Waste District, and the Tribe, all of which were denied. Chief Judge Wollman and Judges Beam and Loken would have granted the State, County, and Waste District Petitions; the latter two judges would also have granted all of the Petitions. The State, local governments, and the Tribe sought certiorari. The United States resisted, telling this Court that the decision was "interlocutory in nature" because of the Eighth Circuit's remand and that this Court would, on completion of the litigation, have a "further opportunity to review" the decision. Brief for the United States in Opposition, *South*

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[4] As discussed in Section II.B, *infra*, Congress enacted § 1151 in 1948 to confirm the definition of "Indian country." Subsections (a), (b), and (c) define three different categories of Indian country, the first of which is reservation land. The statute was amended in 1949, in a minor way not relevant here.

Dakota v. Yankton Sioux Tribe, Nos. 99-1490 and 99-1683, at 27. Certiorari was denied. *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

D. The Third Round of Litigation.

On remand, the district court determined that all land allotted to individual Indians which remained in allotted status, all land taken into trust under the Indian Reorganization Act, and agency land conveyed to the tribe by virtue of the Act of 1929 was "reservation" under § 1151(a). *Podhradsky I*, App. 161-63. It further found that fee lands held continuously by individual Indians were "reservation." *Id.*

Two opinions and one order of the Eighth Circuit followed. In the first of the opinions, *Podhradsky II*, the Eighth Circuit affirmed the district court, with a minor exception. Its earlier non-disestablishment ruling was affirmed on "law of the case" grounds. *Podhradsky II*, App. 90. The Eighth Circuit declared that agency lands, allotments which remained in allotted status, and IRA trust lands, have "reservation" status under § 1151(a). *Id.* at App. 120-21. A small quantity of miscellaneous trust lands were found to constitute dependent Indian communities under § 1151(b). *Id.* at App. 120. The portion of the district court opinion holding that fee lands continuously held in Indian ownership were "reservation" was vacated as there was no evidence of such lands. *Id.* at App. 115-16, 120-21.

The Eighth Circuit also found, for the first time, that the 1948 "Indian country" definition in § 1151 "gave a previously unimagined durability to reservation land . . . while prior to 1948 an allotment on reservation land would have ceased to be Indian country upon its sale to white owners, that is no longer the case today." *Id.* at App. 103-04. The court found no evidence that non-Indians owned any such lands. *Id.* at n.10.

Petitions for rehearing and rehearing en banc were filed by the State and County focusing on the status of allotted lands which had lost that status after 1948. The State's analysis of 2007 Ex. 210 later showed there to be at least 5,900 such acres. The Eighth Circuit, in response to the Petitions, found in an Order on Petition for Rehearing that its language relating to the lands which had lost allotted status post-1948 had not been "incorporated into our judgment." *Podhradsky III*, App. 55. The Eighth Circuit announced that it would excise "footnote 10 and several textual asides" to reduce any potential misunderstanding. *Id.* at App. 56. An Amended Opinion was thereupon issued and it is this opinion, and judgment thereon, which are the subject of this Petition. *Podhradsky IV*, App. 1-51.

Podhradsky IV generally tracks the earlier opinion and relies on the "law of the case" of *Gaffey II* for the proposition that the reservation had not been disestablished. *Podhradsky IV*, App. 20-25. The "reservation" was found to consist of three types of land: (1) 30,051.66 acres of allotted trust lands, or

lands which have been continuously in allotted status; (2) 913.83 acres of agency lands; and (3) 6,444.47 acres of lands acquired in trust for the Tribe under the 1934 IRA. *Id.* at App. 12-13; 51. About 200 non-contiguous parcels within the extinguished boundaries were thus declared to be "reservation." *See* Map at App. 352.[5]

Despite the excision of certain language relating to the effect of § 1151(a) referred to in *Podhradsky III*, App. 55-56, *Podhradsky IV* continued to rely upon the same concepts. In particular, *Podhradsky IV* finds that § 1151 separated the "concept of jurisdiction from the concept of ownership." *Podhradsky IV*, App. 27. Thus, prior to 1948, and the enactment of § 1151, allotted lands which lost allotted status under § 1151(c) within the former boundaries also lost their characteristic as "Indian country." *See id.* at App. 28. After the enactment of § 1151, according to *Podhradsky IV*, allotted lands within the former boundaries also qualify as "reservation," under § 1151(a), *id.* at App. 51, and retain their "reservation" and "Indian country" status even when the allotted status is surrendered. *See id.* at App. 28-29. At least 5,900 acres of allotted lands have, in fact, lost allotted status since 1948; these lands are now owned by non-Indians. *See* 2007 Ex. 210. All of this

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[5] All of the lands on the Map in a color darker than the background are thus "reservation" except for a few parcels of tribal lands held in "unrestricted fee" status and shown in blue-grey.

former allotted land is, at least arguably, permanent "reservation" owned by non-Indians within the extinguished boundaries under *Podhradsky IV*.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Eighth Circuit Squarely Conflict with the Decision of the Unanimous South Dakota Supreme Court.

One day after the Eighth Circuit rejected a finding of disestablishment in *Gaffey II*, the South Dakota Supreme Court issued *Bruguier v. Class*, which unanimously held that the 1894 Act did disestablish the Yankton Sioux Reservation. 599 N.W.2d 364 (S.D. 1999) (reprinted at App. 164-98). That holding directly conflicts with *Podhradsky IV*, which in turn relies on *Gaffey II* as the "law of the case." App. 20-25.

In the state court case, James Bruguier was convicted of burglary committed within the original boundaries of the Yankton Reservation on allotted land to which Indian title had been extinguished. *Bruguier*, App. 165-66. Bruguier's habeas corpus petition asserted that the Reservation remained intact and therefore the State lacked jurisdiction over the crime. *Id.* at App. 165. The habeas judge concluded that the Reservation had been "disestablished" and denied the petition. *Id.* at App. 166. The South Dakota Supreme Court, following this Court's lead in *Yankton Sioux Tribe*, *DeCoteau*, and its own precedent affirmed, concluding that the 1894 Act disestablished, or in the

equivalent words of this Court, *DeCoteau*, 420 U.S. at 425, and the South Dakota Supreme Court, terminated the reservation. *Bruguier*, App. 196-97.

The South Dakota Supreme Court found that the statutory language, the historical context, and later developments in the area all strongly supported termination. As to the former, the court stated that the cession and sum certain language of the Yankton Agreement manifests an almost irrebuttable presumption of congressional intent to terminate. *Id.* at App. 181. This reading is supported, the court ruled, by late nineteenth century views of Indian ownership: At the time it was commonly understood that when tribal ownership was eliminated (for example, by allotting all tribal land to individual Indians), a "'critical component of reservation status' was lost." *Id.* at App. 185 (quoting *Yankton Sioux Tribe*, 522 U.S. at 346). The court went on to find further that "the historical context points to an understanding that the reservation would no longer continue to exist." *Bruguier* at App. 190.

The South Dakota Supreme Court consistently equated the Yankton Agreement with the Lake Traverse Agreement which disestablished that reservation, finding that "[e]quivalent language [to Articles I and II of the Yankton Agreement] signaled termination of the reservation in *DeCoteau*[.]" *Id.* at App. 181. *Bruguier* further found that "congressional intent to end the Yankton Reservation is sufficiently clear in its 'precisely suited' cession language." *Id.* at App. 189.

Bruguier also found a lack of a "jural distinction" between the 1891 agreement at issue in *DeCoteau* and the 1892 Yankton Agreement. *Id.* at App. 195. The court noted the "repeated references" to the Sisseton Agreement during the Yankton negotiations and cited numerous similarities between the two situations: Both Acts sold all unallotted lands; the Acts contained similar preamble language; opened lands on both reservations were subject to the federal homestead and townsite laws; in both instances, the United States retained agency and school lands; and most significantly, no land in common was retained, no boundaries were redefined, and parcels allotted to Indians were in both instances spread randomly across the former reservations. *Id.* at App. 195-96. Accordingly, the court concluded that the "intent" behind the cession language in the 1894 Yankton Act "is unmistakably the same" as that in the 1891 Act that terminated the Lake Traverse Reservation. *Id.* at App. 195. *See also id.* at App. 196 (as in *DeCoteau*, circumstances signaled "congressional intent to terminate the reservation. . . . We believe the same intent is shown in the Yankton Reservation sale.").[6]

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[6] The South Dakota Supreme Court paved the way to *Bruguier* in *Greger, State v. Winckler*, 260 N.W.2d 356, 360 (S.D. 1977) (noting "this court has ruled that the Yankton Indian Reservation was disestablished"); and *State v. Thompson*, 355 N.W.2d 349, 350-51 (S.D. 1984) among other cases.

This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). One obvious example is the first round of this case. *Yankton Sioux Tribe*, 522 U.S. at 342 (granting "certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court[ ]"). *See also DeCoteau*, 420 U.S. at 430-31. In this instance, *Podhradsky IV* has adopted the *Gaffey II* non-disestablishment ruling as the "law of the case" giving barely a nod to the Supreme Court of South Dakota's decision. *Podhradsky IV*, App. 23 n.7. This ruling entrenched the now well-established conflict.[7]

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[7] The Solicitor General on February 25, 2000 recognized that *Bruguier* "wholly disestablished" the reservation Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *United States v. Matt Gaffey*, No. A-___, p. 5 n.1.

II. The Decision of the Eighth Circuit Conflicts with Decisions of This Court and Established Indian Law Jurisprudence.

A. The Eighth Circuit's Decision Conflicts with *DeCoteau v. District County Court*, 420 U.S. 425 (1975), which *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), Held To Be Squarely on Point.

This Court has already addressed the consequences of an agreement by a tribe to cede all of its unallotted reservation lands for a sum certain. In *DeCoteau*, this Court held that such an agreement disestablishes the reservation. As night follows day, the same result must obtain with respect to the Yankton Sioux Reservation.

1. As described in *DeCoteau*, the history of the Lake Traverse Reservation followed the same pattern as the Yankton Sioux Reservation. 420 U.S. at 431-44. The Sisseton and Wahpeton bands of the Sioux Nation (like the Yankton Sioux) remained loyal to the United States when the Sioux Nation rebelled. This prompted the United States to enter into a treaty with the Sisseton-Wahpeton Tribe in 1867 which granted the tribe a reservation in the Lake Traverse area. "But familiar forces soon began to work upon the Lake Traverse Reservation[,]" forces which led to the Dawes Act and the allotment of more than 120,000 acres of the reservation. *Id.* at 431, 438 n.19. In 1889, a series of negotiations took place that resulted in an agreement through which

the Sisseton-Wahpeton Tribe agreed to cede – for a sum certain – all the unallotted lands within its reservation. *Id.* at 437. Additional allotments of over 110,000 acres were also provided for. *Id.* at 438 n.19. Two years later, Congress enacted a statute reciting and ratifying the agreement. Act of March 31, 1891, ch. 543, 26 Stat. 1035. In *DeCoteau*, this Court held that "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." 420 U.S. at 445.

In particular, the Court in *DeCoteau* pointed to the following factors as critical to its decision. First, "[t]he negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* Second, "[t]he Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.* Third, that "language is virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446. Fourth, the agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-49. And fifth, "[u]ntil the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

2. The pattern of the Sisseton Agreement was followed during the Yankton negotiations. First, as at Sisseton, the negotiations show that the Yankton tribal members were willing to convey all their interest in all their unallotted lands to the Government for a sum certain. *Yankton Sioux Tribe*, 522 U.S. at 344. Second, the language of the Yankton Agreement was adopted by majority vote and was precisely suited to this purpose. *Id.* Third, the Yankton language is virtually indistinguishable from the sum certain agreement ratified at Sisseton. *Id.* Fourth, the Yankton Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." *Id.* at 345. Fifth, the State assumed "jurisdiction over the [non-Indian lands] almost immediately after the 1894 Act and continuing virtually unchallenged to the present day[.]" *Id.* at 357.

Present day demographics also support disestablishment at Yankton, as they did in *DeCoteau*. 420 U.S. at 428. In Sisseton, about "15% of the land is in the form of 'Indian trust allotments.'" *Id.* At Yankton, about 8.8 percent of the land is in some kind of trust (about 37,600 acres of 430,000). *Podhradsky IV*, App. 5. About 3,000 tribal members and 30,000 nontribal members inhabited the former reservation at Sisseton. *DeCoteau*. 420 U.S. at 428. "[N]on-Indians constitute over two-thirds of the population within the 1858 [Yankton] boundaries." *Yankton Sioux Tribe*, 522 U.S. at 356. This Court thus characterized the Yankton area as "'predominantly populated by non-Indians.'" *Id.* at 356-57 (citation omitted).

3. The Eighth Circuit nonetheless held that *DeCoteau* did not control finding that the "circumstances surrounding the negotiation[s]" and "the content and wording of the agreements" were very different. *Gaffey II*, App. 221. The latter point flies directly in the face of this Court's statement in *Yankton Sioux Tribe* that Articles I and II of the two Agreements were virtually identical and that the "terms" of the agreements are "parallel." 522 U.S. at 344.

As to the negotiating history, the Eighth Circuit found that the "background" of the Sisseton-Wahpeton Agreement was "very different . . . because the tribal members there had expressed their clear desire to terminate their reservation." *Gaffey II*, App. 220-21. Yet, in support of this, the court appears to cite nothing more than a press report (quoted in *DeCoteau*, 420 U.S. at 433), in which Sisseton-Wahpeton tribal spokesmen are reported to have said that "[w]e never thought to keep this reservation for our lifetime." That is a slender reed upon which to rest a fundamental distinction between the Agreements, particularly in light of the Commissioner's understanding that "cession of the surplus lands dissolved tribal governance of the 1858 reservation" and the letter written by three Yankton chiefs and more than 100 members of the Yankton Tribe to the Congress which "indicated they concurred in such an interpretation." *Yankton Sioux Tribe*, 522 U.S. at 353. The letter stated that they

> "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation. . . ."

Id. (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). It is generally true, as the Eighth Circuit found, "that similar treaty language does not *necessarily* have the same effect when dealing with separate agreements." *Gaffey II*, App. 221 (emphasis added). But "cession and sum certain" language uniquely creates a "presumption" applicable in future cases and thus is necessarily not nearly so malleable as other agreement language. Moreover, the argument of the Eighth Circuit as to the meaning of this language lacks validity when this Court has closely tied two agreements together, as here. 522 U.S. at 344.

4. The district court questioned the identity of the Sisseton and Yankton cases on the ground that this Court could have, but did not, resolve the disestablishment question for the State in its first hearing. *Gaffey I*, App. 311. The basis for this Court's nonresolution of the question is, however, unambiguous: The Court found that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly we decline to do so," and pointed to two questions which warranted "caution" about finally resolving the disestablishment issue. *Yankton Sioux Tribe*, 522 U.S. at 358.

The first question concerned "conflicting understandings about the status of the reservation." *Id.* The South Dakota Supreme Court precisely answered this question in 1999, finding that the "palpable reality" of the reservation's status was that "as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the

homesteaders, not the townspeople." *Bruguier*, App. 191; *see City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 218 (2005) (noting "longstanding observances" are "prime considerations" in claim to tribal sovereignty). *See also*, 1897 County action recognizing "increase[ ]" in number of townships "by the addition of what was formerly the Yankton Indian Reservation," 2008 SA 366-67; 1897 naming of tribal members to jury lists and as constable, 2008 SA 367-68, 369; 1909 selection of tribal member as Clerk of Courts. 2008 SA 442.

The second point of hesitancy in *Yankton Sioux Tribe* regarded tribal "land in common." 522 U.S. at 358. The Court impliedly demanded more information about whether the Tribe actually retained land in common after 1894. The Court's problem is clear in retrospect. The Tribe's lawyer, at oral argument, incorrectly stated that "there were tribal lands in 1894" and that "[t]here was a mile square they retained for their headquarters." Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 1997 WL 762057 (Dec. 8, 1997), at *41-43. The federal lawyer repeated the error. *Id.* at *48. South Dakota's Attorney General, in rebuttal, explained that "there was no tribal land base left" and "tribal communal ownership was over." *Id.* at *54. The resulting uncertainty, however, obviously concerned the Court, as seen in its opinion. *Yankton Sioux Tribe*, 522 U.S. at 358.

Unrefuted evidence regarding "land in common" on remand confirmed that the Tribe retained no "land in common" after the 1894 Act. *Gaffey II*, App. 229-30; *Bruguier*, App. 185. *See also* Agreement, App.

339. Indeed, the issue of whether the Tribe *should* retain lands had been raised by John Omaha, a tribal member who, during the 1892 negotiations, proposed that the Tribe "hold" certain "Missouri River bottom" unallotted lands in common, but his plan gained no support from either the tribal or federal negotiators. 1998 JA 172-73. By failing to retain any land in common, "a critical component of reservation status" was lost. *Yankton Sioux Tribe*, 522 U.S. at 346. *See also Bruguier*, App. 185.

B. The Eighth Circuit's Decision to Carve Out Three Categories of "Trust Land" as "Reservation" Land Contravenes This Court's Decisions, Established Indian Law Jurisprudence, and Common Sense.

Having erroneously concluded that the 1892 Yankton Agreement contemplated a continued "reservation," the Eighth Circuit went about determining what particular lands constituted the "reservation." The Eighth Circuit's analysis pivots on 18 U.S.C. § 1151, which defines the term "Indian country" to mean

> (a) all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent . . .
>
> (b) all dependent Indian communities . . .
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished. . . .

Each of the three kinds of "Indian country" is beyond the normal jurisdiction of the State for most purposes. For example, the State lacks criminal jurisdiction over Indians within any area of "Indian country" as defined by § 1151. The critical difference between the three types of Indian country for present purposes is that "reservation" land as classified under § 1151(a) holds that status permanently. As *Podhradsky IV* explains, lands which qualify as "reservation" under § 1151(a) have a "considerably more durable" status as Indian country than other lands which qualify as Indian country, in that they "retain their status 'notwithstanding the issuance of any patent,' including a patent which terminated a trust and conveyed the land in fee simple." *Podhradsky IV*, App. 28. On the other hand, allotted lands under § 1151(c) retain their Indian country status, under the very terms of the statute, only so long as the Indian title is "not . . . extinguished." *See also, id.* The question whether allotted lands under § 1151(c) are also "reservation" under 1151(a) is thus "important" as *Podhradsky IV* specifically finds. *Id.*

The Eighth Circuit held that three types of land within the former boundaries of the Yankton Reservation are "reservation" under § 1151(a). The State disagrees, not only because the entire Reservation was disestablished in 1894, but also because the Eighth Circuit committed fundamental errors of Indian law in analyzing each type of property. These errors exacerbate the negative consequences of the

Eighth Circuit's ruling and increase the need for this Court's review.

1. The largest category of lands held by the Eighth Circuit to be permanent "reservation" under § 1151(a) – over 30,000 acres – is that of lands which remain in allotted status under § 1151(a). *Id.* at App. 34. This ruling is inconsistent with the § 1151 definition of "Indian country" which separately derives each of the three categories of "Indian country" from the common law. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 530 (1998). *Venetie* confirmed that the § 1151(c) category – "Indian allotments, the Indian titles to which have not been extinguished" – is derived from *United States v. Pelican*, 232 U.S. 442 (1914):

> Before § 1151 was enacted, we held in three cases that Indian lands that *were not reservations* could be Indian country and that the Federal Government could therefore exercise jurisdiction over them. *See . . . United States v. Pelican*, 232 U.S. 442 (1914).
>
> . . . .
>
> In *United States v. Pelican*, we held that Indian allotments – parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians – *were* Indian country.

522 U.S. at 528-29 (emphasis added). Indian allotments were "Indian country," but not "reservation,"

because they were owned by the federal government for the benefit of individual Indians and because the government exercised jurisdiction over the lands. While this historical definition of allotment was adopted in § 1151, the Eighth Circuit ignored it, finding essentially that the allotments in *this* case had to be "reservation" for the reasons that the "tribal members retained beneficial interest in the allotments" and that the Tribe was "concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands." *Podhradsky IV*, App. 31-32. These are the very qualities that define *allotted* lands – beneficial ownership by the United States for the individual Indian, federal support and superintendence, and tribal jurisdiction until the allotment is surrendered. *Podhradsky IV* negates the well-defined § 1151 categories and the case law supporting them.

Second, the finding that individual "allotments" are freestanding "Indian reservations" is theoretically deficient in another way. The hallmark of "reservation" status is the holding of land in common: at the time of the 1894 Agreement, "tribal ownership was a critical component of reservation status." *Yankton Sioux Tribe*, 522 U.S. at 346. The allotment of land, however, eliminates "any tribal property interest" in the land. Nell Jessup, Editor, *Cohen's Handbook of Federal Indian Law* 195 (2005 ed.). *See also Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) ("throughout the congressional debates, allotment of

Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction"). Indeed, as *Cohen* points out, an "allotment is private property for purposes of fifth amendment takings." *Cohen* at 195 n.439. Congress could not in 1894 have intended to create or maintain "reservations" consisting only of individual parcels of allotted land in which the tribe had no property interest (and "agency land" in which the tribe had no interest, *see infra*, II.B.2), because a critical component of a "reservation," i.e., "tribal ownership" had been surrendered as to all of those very lands.

Third, the finding of the Eighth Circuit that the allotted lands remained "reservation" is flawed in that it ignores the rationale that informed the *DeCoteau* Court – when "cession and sum certain" language is used, reservation status is terminated for *all* lands, at least when all of the unallotted lands are ceded so that the tribe retains no lands in common. *DeCoteau* thus indicates that "exclusive federal jurisdiction" within the extinguished boundaries at Sisseton is "limited to the *retained* allotments," and thus did not extend to extinguished allotments. 420 U.S. at 446 (emphasis added).

There are over 100,000 acres of land in trust within the former Sisseton or Lake Traverse Reservation, most of which are undoubtedly allotments (and not land acquired under 25 U.S.C. § 465 or other statutes). *See* 2007 Ex. 117; *United States Department of the Interior v. South Dakota*, No. 95-1956, Petition for Writ of Certiorari, pages 4, 17 (hereinafter

Petition). There is no reason why the fewer number of allotted acres at Yankton should have "reservation" status while the greater number of allotted acres at Sisseton have been held not to have "reservation" status. The same argument, with more effect, can be made in the areas of the Rosebud and Pine Ridge Reservations which were extinguished even without full cession and sum certain language. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603 (1977); *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975). There are likely half a million acres of allotted lands within the extinguished areas of these two reservations. *See* 2007 Ex. 117; Petition at 4, 17. The allotted land within these extinguished areas is clearly not "reservation" under § 1151(a) and is not treated as such. *See generally United States v. Stands*, 105 F.3d 1565, 1571 (8th Cir. 1997); *State ex rel. Hollow Horn Bear v. Jameson*, 95 N.W.2d 181, 185 (S.D. 1959). Rather, it is treated as § 1151(c) allotted land.

Fourth, it is established law that reservation land does not lose its "reservation" status by virtue of a transfer of a patent. *Seymour v. Superintendent*, 368 U.S. 351, 357-58 (1962). Yet, as even the Eighth Circuit acknowledged, 230,000 acres of the 262,000 acres allotted to Yankton Tribe members (*see Yankton Sioux Tribe*, 522 U.S. at 339) which had been transferred to non-Indians *did lose* their supposed "reservation" status. *Podhradsky IV*, App. 33-34; *Gaffey II*, App. 247. This logically means that none of the "allotted lands" could have been "reservation" lands after the 1894 Act and that the decision of the Eighth Circuit is internally contradictory.

2. Second, the Eighth Circuit, relying on "law of the case," found the 1,000 acres of "agency land" which had been "ceded" to the United States under Article VIII of the Agreement to be "reservation" under § 1151(a). *Podhradsky IV*, App. 20-21. The categorization of these lands as "reservation" is the unlikely foundation upon which the Eighth Circuit rebuilt a Yankton Reservation. *Id.* The most obvious problem with holding that the agency land "continues to be a reservation" is that it contradicts the holding of *Yankton Sioux Tribe* that "the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." 522 U.S. at 342. Because the agency land was "unallotted" and had been "ceded" to the United States, as the Eighth Circuit acknowledges, it fell within the precise holding of this Court. *See Podhradsky IV*, App. 8-9. *See also DeCoteau*, 420 U.S. at 435 n.16, 438 n.19 (similar lands at Sisseton).

Even if the Eighth Circuit could conceivably undermine this Court's precise holding, it failed to do so. Articles I and VIII conveyed the agency lands (along with the other unallotted lands) to the United States. Agreement, App. 339, 342-43. At that point, the agency lands passed "free and clear of all of the claims of the Indians," according to the BIA Solicitor. 1998 JA 571. Lacking tribal ownership, they could hardly have been "reservation" at this time.

Article VIII provided that the lands would be "reserved from sale to settlers until they are no longer needed for [agency, schools and other purposes]." Agreement, App. 343. The Act of February 13,

1929, 45 Stat. 1167, altered, in part, the function of Article VIII and provided that the lands should be disposed of to the tribe, rather than to settlers, but retained the requirement that disposal could occur only "when they are no longer required for agency, school, or other purposes." According to the Solicitor, that day arrived by 1934. 1998 JA 572. The mere conveyance to the Tribe, however, failed to give the agency lands the status of "reservation." *Venetie* finds that in "enacting § 1151 Congress codified" the "requirements" for classification of "'Indian country' generally" that the lands "must have been set aside by the Federal Government for the use of the Indians as Indian land [and] they must be under federal superintendence." 522 U.S. at 526-27. Lands do not qualify as any type of "Indian country," including that of a "reservation" unless they meet, at the minimum, these two requirements. *Id.* at 530; Clay Smith, Chief Editor, *American Indian Law Deskbook* 69-70 (4th ed. 2008). Because the ceded agency lands could be transferred to the Tribe *only* when the government no longer intended to use them for any purpose, they could hardly be argued to be "set aside as Indian lands" and most definitely could not be argued to "be under federal superintendence" when conveyed as a result of the 1929 Act.[8]

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[8] This is further confirmed by the Department of Interior's objection to the bill: "It would be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable

(Continued on following page)

3. The Eighth Circuit also held that lands acquired in trust within the extinguished boundaries since 1934 – about 6,400 acres – attain "reservation" status by virtue of the 1934 Act. The Secretary can proclaim lands acquired in trust under 25 U.S.C. § 465 and other authority to constitute a "reservation" by following the procedures set forth in 25 U.S.C. § 467. The Eighth Circuit, however, held that, when lands are within the extinguished boundaries of the reservation, the Secretary need not comply with 25 U.S.C. § 467 to create new "reservation," and that he can do so merely by taking land into trust. *Podhradsky IV*, App. 41-42. This holding is flawed in that it usurps a congressional prerogative. Once Congress has taken down the boundary of a "reservation," as here, the courts lack the ability to give that extinguished boundary dispositive weight in creating new "reservation" land.

4. Finally, the flawed rationale of the Eighth Circuit apparently converts lands which lost allotted status after the enactment of § 1151 in 1948 into "permanent reservation" and logically means that these fee lands held by non-Indians are today "reservation." This follows because *Podhradsky IV* found the "distinction" between allotted lands which qualified as "reservation" under § 1151(a) and those which

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conditions that could not be readily controlled." 1998 JA 723-24. Agency lands conveyed to the Tribe as a result of the 1929 Act were ultimately reconveyed to the United States in trust. *See* II.B.3, *infra*.

qualify or y as allotments under § 1151(c) to be "important" for the reason that if the allotted lands also qualified as "reservation" they would "retain their status 'notwithstanding the issuance of any patent, including a patent which terminated a trust and conveyed the land in fee simple.'" *Podhradsky IV*, App. 28. *Podhradsky IV* then found the "outstanding allotments" to constitute "reservation" under § 1151. *Podhradsky IV*, App. 51. The practical result appears to be that at least 5,900 acres of former allotted lands which lost that status after 1948 and came into non-Indian ownership within the extinguished boundaries have been declared "reservation." *See* 2007 Ex. 210. (The State observes that the Tribe may seek certiorari in *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), likely arguing that it is in conflict with *Podhradsky IV* on this issue.)

III. The Issues Raised by This Case Are Important and Recurring.

The decision below merits this Court's review because it so far departs from this Court's prior decisions on a critical issue in Indian law, i.e., when is a reservation "disestablished," and because the decision directly conflicts with the authoritative ruling of the South Dakota Supreme Court. Moreover, the decision of the Eighth Circuit has created an untenable situation for those who must attempt to live in and govern the disputed area and similar areas nationwide.

In the case before this Court, the Eighth Circuit has created roughly 200 "mini-reservations" under § 1151(a) within the extinguished boundaries of the 1858 reservation. *See* App. 352. Under the rationale of the Eighth Circuit, each of the 200 "mini-reservations" has boundaries cast in stone. *Podhradsky IV*, App. 28. If a tribal member determines to terminate his allotment and sell the land to a non-Indian, and the United States consents, the allotment is extinguished, but the "reservation" status of the land is presumably retained. *Id.*; 18 U.S.C. § 1151(a). The Tribe itself rejected this approach earlier, stating that "drawing a boundary around each parcel of land, or each Indian-owned parcel would result in an absurdity, and realistically cannot be done." Case 4:98-cv-04042-LLP, Doc. 347, filed 10/24/2007, *Yankton Sioux Tribe v. Podhradsky*, Plaintiff's Response to State and County Brief on Status of Reservation Lands and Existence of Boundaries, at 3.

The rule of the Eighth Circuit moreover creates the prospect of thousands or perhaps tens of thousands of such permanent "mini-reservations" nationally because it is commonplace that terminated areas of reservations contain allotted land, and land is often taken into trust under 25 U.S.C. § 465 and other statutes in such areas.

As pointed out above, there are well over half a million acres of allotted land within extinguished areas of reservations in South Dakota; such land is treated today as mere allotted land. The decision of

the Eighth Circuit raises the prospect of new challenges with regard to this land, consisting of claims that the land is not only allotted land under § 1151(c) but is "reservation" under § 1151(a) which retains that status when transferred to non-Indians. Such claims seem inevitable, because there is no characteristic which reliably distinguishes the Yankton cession and sum certain act from the terms of other Acts.

Indeed, a substantial amount of land has left allotted status since 1948 within the extinguished boundaries of the Yankton Reservation; such land is now owned by non-Indians in fee. This 5,900 acres presumably constitutes an "invisible" reservation – not marked on any map in general circulation – and jurisdictional battles between the State and federal courts will inevitably arise.

Nationwide, based on representations of federal authorities, roughly 48,000,000 acres are in allotted status, and 9,000,000 acres have been taken into trust. *See* Petition 4, 17. Land moreover moves from trust to non-trust status at a brisk pace. According to the Government Accountability Office, about 360,000 acres gained trust status nationally in 1997, while 260,000 acres lost trust status. 2007 Ex. 130, at 9 n.8. An unknown, but certainly significant, amount of the land leaving trust status is surely allotted land within extinguished reservation boundaries. In each case, there is now a potential claim that the parcel of former allotted land within extinguished boundaries is itself "reservation" with boundaries.

The practical problem is serious. If the former allotted and trust lands are "reservation," profound jurisdictional consequences attach. Civil and criminal jurisdiction, regulatory authority, and authority with regard to taxation are all deeply impacted by the determination that land is reservation. *See American Indian Law Deskbook*, at 48, 68-69. In particular, a state loses much of its preexisting jurisdiction over civil causes of action arising on reservations. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959) (state lacks jurisdiction of claim of non-Indian against Indian for reservation transaction). Similarly, the state's ability to impose various taxes is deeply impacted by reservation status. *See McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973). Moreover, the courts have found that the state surrenders virtually its entire criminal jurisdiction with regard to incidents involving Indians on reservations. *See American Indian Law Deskbook*, at 158-61. The potentially profound impacts on State, federal, and tribal jurisdiction of the decision below argue for this Court's intervention.[9]

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[9] In the alternative to plenary disposition, summary disposition directing further consideration of *Yankton Sioux Tribe* below may be appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Petitioners
Dennis Daugaard,
Governor of South Dakota,
and Marty J. Jackley,
Attorney General of South Dakota

606 F.3d 994

United States Court of Appeals,
Eighth Circuit.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,

v.

Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,
Southern Missouri Waste Management District, Interested Party.
Rosebud Sioux Tribe, Amicus on behalf of Appellees.
Nos. 08-1441, 08-1488.

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Pamela H. Hein, Dee Mulder, Lake Andes, SD, Tom D. Tobin, Winner, SD, for Charles Mix County.

John P. Guhin, Deputy Attorney General, Meghan N. Dilges, Asst. Attorney General, Pierre, SD, for State of South Dakota.

Mark E. Salter, AUSA, Sioux Falls, SD, for United States of America.

Rebecca L. Kidder, Charles Abourezk, Rapid City, SD, for Yankton Sioux Tribe.

Eric John Antoine, Rosebud, SD, Terry L. Pechota, Rapid City, SD, on the amicus briefs, for Rosebud Sioux Tribe.

Timothy R. Whalen, on the amicus brief, Lake Andes, SD, for The Frank Soukup Family Limited Partnership, Mark Van Duysen, and Dan Cimpl.

Kenneth Wayne Cotton, on the amicus brief, Wagner, SD, for Southern Missouri Waste Management District.

Scott J. Podhradsky, on the amicus brief, Wagner, SD, for Wagner Community School District No. 11-4.

Michael James Whalen, on the amicus brief, Rapid City, SD, for Charles Mix Electric Association.

Sandy Steffen, Gregory, SD, Susan W. Phalke, Winner, SD, Michael B. Strain, White River, SD, Gay K. Tollefson, Martin, SD, on the amicus briefs, for Tripp County, Gregory County, Mellette County and Bennett County, SD.

Craig Parkhurst, on the amicus brief, Armour, SD, for Cities Dante, Geddes, Lake Andes, Pickstown Platte, Rivinia and Wagner.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

AMENDED OPINION

MURPHY, Circuit Judge.

In this action the Yankton Sioux Tribe (Tribe) and its members sought declaratory and injunctive relief against officials of Charles Mix County[1] and the State of South Dakota[2] in respect to the boundaries of the Yankton Sioux Reservation. In an earlier stage of the case we held that the Tribe's 1894 cession of certain land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). We remanded to the district court for further development of the record and for "findings relative to the status of Indian lands which are held in trust." *Gaffey II,* 188 F.3d at 1030.

An earlier action had been filed by the Tribe against the Southern Missouri Waste Management District (Waste District), seeking a declaration that the 1858 boundaries of the reservation remained intact and that therefore a particular site at issue was subject to federal environmental regulation.

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[1] Scott Podhradsky, state's attorney for Charles Mix County, and individual members of the county commission. During the course of this consolidated litigation, Podhradsky replaced Matt Gaffey as state's attorney and first named defendant.

[2] Governor Michael Rounds and Attorney General Lawrence Long

After the Tribe prevailed in the district court and on appeal, *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996), the Supreme Court reversed. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Yankton Sioux Reservation had been diminished by the Tribe's cession of certain lands to the United States in 1894 and that the parcel at issue in the Tribe's dispute with the Waste District was not reservation land.[3] The Court remanded for determination of the larger question of whether the Yankton Sioux Reservation had been disestablished or diminished.

On remand the original case was consolidated with this separate action against the county and state officials in which the Tribe seeks a declaratory judgment that all land not ceded to the United States in 1894 remains part of the Yankton Sioux Reservation under the jurisdiction of the Tribe and the federal government. The United States intervened on its own behalf and for the benefit of the Tribe. The district court ruled in favor of the Tribe, concluding that the reservation had not been disestablished but consisted of all land not ceded in 1894 as well as certain

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[3] The Tribe has never dismissed its action against the Waste District which remains an inactive interested party, not having filed a notice of appeal. The district court observed that district representatives were present during the *Podhradsky* trial but had not played an active role after October 2004.

reserved "agency trust lands." *Yankton Sioux Tribe v. Gaffey (Gaffey I),* 14 F.Supp.2d 1135 (D.S.D.1998). The defendants appealed, and we affirmed in part, reversed in part, and remanded for further proceedings, *Gaffey II,* 188 F.3d at 1030-31, holding that the reservation had been diminished rather than disestablished and that it included at least the agency trust lands, but reversing and remanding in other respects.

Now before our court are appeals filed by both sides from the judgment issued by the district court after additional proceedings on remand, *Yankton Sioux Tribe v. Podhradsky,* 529 F.Supp.2d 1040 (D.S.D.2007). The district court ruled that some 37,600 acres of trust land remained part of the reservation and that land continuously owned in fee by individual Indians also qualified as reservation. The county and state defendants appeal, and the Tribe, supported by the intervening United States, cross appeals. We affirm in part and vacate in part.

I.

The original boundaries of the Yankton Sioux Reservation were created by treaty between the Tribe and the United States on April 19, 1858, 11 Stat. 743 (1858 Treaty). In that treaty, the Tribe ceded more than 11,000,000 acres of land to the United States

and reserved to itself approximately 430,400[4] acres in what is now Charles Mix County, South Dakota. The United States guaranteed to the Tribe "the quiet and peaceable possession of the said tract," 11 Stat. at 744, and agreed that, with certain exceptions, "[n]o white person . . . shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians," 11 Stat. at 747. The subsequent history of the Tribe and its reservation reflects the changing policies of the federal government over the succeeding years.

In the first half of the nineteenth century, federal Indian policy focused on removing tribes from the eastern half of the country and relocating them on western lands, but by the time of the 1858 Treaty, "federal policy had shifted fully from removal to concentration on fixed reservations." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], at 65 (2005 ed.) (*Cohen*). These reservations were "envisioned as schools for civilization, in which Indians under the control of the agent would be groomed for assimilation." *Id.*

As the westward migration of white settlers accelerated following the Civil War, pressure grew to

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[4] Although the 1858 Treaty refers to 400,000 acres, a later survey concluded the reservation contained 430,405 acres at the time of the treaty *See* Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec. 9, 1893), *reprinted in* S. Exec. Doc No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (Commissioner's Letter).

open Indian reservations for agricultural and resource development by the newcomers. Supporters of Indian assimilation argued that as more Indians adopted white customs and agricultural practices, their need for large tracts of reservation land would diminish, freeing vast areas for white settlement and development. This approach was formalized in the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (repealed in part by Pub.L. No. 106-462 § 106, 114 Stat. 1991, 2007 (2000)).

Under the Dawes Act, the executive branch was authorized to divide portions of Indian reservations into personally assigned allotments to be distributed to individual tribal members. *Id.* § 1, 24 Stat. at 388. The Secretary of the Interior was directed to issue patents, under which the United States would hold title to the allotments in trust for twenty five years "for the sole use and benefit of the Indian to whom such allotment shall have been made." *Id.* § 5, 24 Stat. at 389. At the end of the trust period, allottees would take fee simple ownership of their individual plots, free of any restrictions against sale or alienation to non Indians. *Id.* Furthermore, once a reservation had been divided into allotments, the government was empowered to negotiate with the tribes for the purchase of unallotted surplus land and to open such areas to white settlement. *Id.*

The allotment policy in general and the Dawes Act in particular were intended to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property

ownership. "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe*, 522 U.S. at 335, 118 S.Ct. 789.

Acting under the authority of the Dawes Act, federal agents allocated to tribal members individual allotments comprising 167,325 acres of the then 430,405 acre Yankton Sioux Reservation. Another 95,000 acres were subsequently allotted to tribal members under the Act of February 28, 1891, 26 Stat. 794 (1891 Act). These tribal allotments, totaling approximately 262,300 acres, were not contiguous parcels of land. Rather, the individual allotments were scattered across the reservation and interspersed with approximately 168,000 acres of unallotted surplus land. Commissioner's Letter at 5.

In 1892 a three member Yankton Indian Commission, which represented the Secretary of the Interior, traveled to the reservation to discuss the federal government's interest in acquiring the Tribe's surplus land. After lengthy negotiations, the Tribe agreed to sell all of the unallotted acreage to the United States for $600,000. The ceded land was then to be opened to white settlement, with the exception of roughly 1,000 acres specifically reserved for use by the United States for "agency, schools, and other purposes." Act of August 15, 1894, ch. 290, 28 Stat. 286, 316 (1894 Act). These set aside agency reserve lands were expected to be opened for white ownership at such time as they were no longer needed for the

Tribe's support. *Id.* The Supreme Court has commented that the set aside of these agency lands is evidence that Congress envisioned an ongoing reservation despite the sale of the surplus lands. *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789.

Congress ratified the cession agreement by statute in the 1894 Act, and in May 1895 President Grover Cleveland issued a proclamation opening the ceded land to white settlement. In *Yankton Sioux Tribe* the Supreme Court ruled that the land ceded to the United States under the 1894 Act was thus no longer part of the Yankton Sioux Reservation but fully subject to the jurisdiction of South Dakota. 522 U.S. at 358, 118 S.Ct. 354. By the end of the nineteenth century federal Indian policy had therefore reduced the Tribe's land holdings from a sizeable communal reservation to a checkerboard of individual allotments intermingled with white homesteads.

Subsequently Congress passed the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (Burke Act), amending § 6 of the Dawes Act. The Burke Act gave the Secretary of the Interior the discretion to remove allotted land from trust status and to issue fee simple patents, either upon the death of an Indian allottee or upon a finding that an allottee was "competent and capable of managing his or her affairs." 34 Stat. at 183. Upon issuance of fee simple patents, such Indian owned land would then be freely alienable to white settlers. As a result of fee patents issued under the Burke Act, tribal allotments began passing into white hands well before the expiration of the original twenty

five year trust period set by the Dawes Act. By 1930, tribal members held only 43,358 acres of land out of the more than 262,300 acres originally carved into Indian allotments.[5] Herbert T. Hoover, A Yankton Sioux Tribal Land History 5 (1995) (unpublished manuscript).

In 1916, recognizing the rapid erosion of the Tribe's allotted lands, President Woodrow Wilson issued an executive order extending by ten years the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust periods were again extended in 1926 and 1929. Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929. In 1929 Congress also reconsidered the disposition of the roughly 1,000 acres of land which had been set aside for "agency, schools, or other purposes." Although the 1894 Act originally envisioned that these lands would be opened to white settlement once they had served their intended

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[5] The Tribe argues that the Burke Act did not apply to allotments made on the Yankton Sioux Reservation and that therefore some 300 "forced fee patents" issued under it should be considered null and void. The Tribe did not raise this argument until after the case was before the district court for the third time. As that court noted, "[t]here is . . . a limit as to what should be undertaken . . to determine reservation boundary issues that were not raised or addressed by this Court nor the superior courts. This issue . . . [is] beyond the scope of this litigation. . ." *Yankton Sioux Tribe v. Gaffey*, No. CIV 98-4042, 2006 WL 3703274, at *3 (D.S.D. Dec. 13, 2006) (order identifying the issues to be considered on remand). We agree.

purposes, Congress decided instead to return them to the Tribe and specifically precluded any allotments on these parcels. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act).

During this period, the consequences of the allotment and assimilation policies became acutely obvious. The process of allotment and the liberalized issuance of fee patents under the Burke Act left many Indians landless and reduced once coherent communities to jurisdictional checkerboards, as is currently reflected in respect to the Yankton Sioux Reservation. *Cohen*, § 1.04, at 78. Moreover, "[t]he process of transforming Indian culture into white culture proved more difficult than placing an Indian name on allotted land deeds. . . . [T]he cultural resilience of the American Indian amazed even the most dedicated reformer." *Id.* at 80.

By the early twentieth century, the forces behind allotment and assimilation were nearly exhausted, and federal policy was reoriented towards "new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems." *Id.* § 1.05, at 84. In time this new attitude led to the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*).

The IRA reflected a fundamental change in federal Indian policy. It prohibited further allotment

of Indian lands and indefinitely extended the trust periods for outstanding allotments. The Act also authorized the Secretary of the Interior to acquire additional lands in trust – both on and off reservation – and either to proclaim these lands part of a new reservation or to add them to an existing one. Since the passage of the IRA, the government has taken almost 6,500 acres into trust for the benefit of the Yankton Sioux Tribe.

This tangled history, along with the inconsistent and sometimes contradictory policies pursued by the national government, has produced a confusing patchwork of land holdings and jurisdictional claims within the original 1858 boundaries of the reservation. For ease of exposition, we have identified six general categories of land.

> (1) *Allotted Trust Lands:* lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members. This category includes allotments which were later transferred from individual to tribal control, so long as the trust status was maintained. The district court found 30,051.66 acres of land fit this description.[6]
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> (2) *Agency Trust Lands:* lands ceded to the United States in the 1894 Act but reserved for

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[6] In *Yankton Sioux Tribe* the Supreme Court mentioned 30,000 acres held in trust for individual Indians and 6,000 acres of "tribal lands." 522 U.S. at 796, 118 S.Ct. 948.

"agency, schools, and other purposes" which then were returned to the Tribe according to the 1929 Act. The district court identified 913.83 acres of land within this category. We held this category of land to be part of the diminished Yankton Sioux Reservation in *Gaffey II*. 188 F.3d at 1030.

(3) *IRA Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe pursuant to the IRA. The district court identified 6,444.47 acres of such land.

(4) *Miscellaneous Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe other than pursuant to the IRA. Approximately 174.57 acres fit within this category.

(5) *Indian Fee Lands:* allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership. The record does not identify lands which may fit this description.

(6) *Non Indian Fee Lands:* lands ceded to the United States in the 1894 Act and subsequently opened to white settlement which have not been reacquired in trust; and nonceded lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust.

Of these six categories, the first four may be generically referred to as "trust lands" and the last two as "fee lands."

The trust lands are spread across the site of the original 1858 reservation in a complex checkerboard pattern, intermingled with lands long since occupied by white homesteaders. As a result the Yankton Sioux trust lands are not neatly contained within a single continuous boundary. The defendants urge that this characteristic shows the reservation has ceased to exist, but they cite no authority which requires that a reservation consist of compact, contiguous lands. While the fractured configuration of the Yankton Sioux Reservation may not seem ideal to various parties, it is a historic artifact resulting from shifting federal policy. There was evidence at trial that the parties have long experience in dealing with this historical reality. For example, defendant Scott Podhradsky, state's attorney for Charles Mix County, testified that local and federal officials have developed a respectful and productive working relationship despite the complex jurisdictional boundaries.

In short, the 11,000,000 acre domain once assigned to the Tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894. The issues now before us include the status of some 37,600 acres held in trust. Whatever the size of the remaining reservation lands, there is evidence in the record that they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.

II.

In September 1994 the Yankton Sioux Tribe commenced its civil action against the Waste District seeking to prove that the site of a proposed landfill was in fact located on the Yankton Sioux Reservation and was therefore subject to federal environmental regulations. The Waste District filed a third party complaint and added the State of South Dakota as a party. In 1995 the district court decided that the original reservation boundaries as established by the 1858 Treaty remained in force. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996).

The Supreme Court reversed, holding that all lands which had been ceded to the United States pursuant to the 1894 Act had thereby lost reservation status and were returned to the public domain. The Court specifically reserved the question of whether the 1894 Act had disestablished the entire reservation or whether a diminished reservation continued to exist within the nonceded lands. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). It also observed that the Act's special treatment of the reserved agency trust lands was an indication that Congress intended some sort of continuing reservation. *Id.* at 350, 118 S.Ct. 789. The case was then returned to our court, and we remanded to the district court for further proceedings. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 141 F.3d 798, 799 (1998).

On remand the district court consolidated the original case against the Waste District with this separate civil action brought by the Tribe against various state and county officials seeking injunctive and declaratory relief. The Tribe asserted that the Yankton Sioux Reservation had been diminished only by those lands ceded in the 1894 Act and that all other lands within the 1858 boundaries – that is, the 262,300 acres comprising the original allotted trust lands – remained part of the reservation regardless of their later disposition. The Tribe argued that such lands were therefore within the jurisdiction of the Tribe and the federal government. The United States successfully intervened on behalf of the Tribe. After considering the parties' arguments, the district court held in favor of the Tribe and the government and declared that the Yankton Sioux Reservation continued to exist and consisted of the agency trust lands in addition to all other lands which had not been ceded in the 1894 Act. *Yankton Sioux Tribe v. Gaffey (Gaffey I),* 14 F.Supp.2d 1135 (D.S.D.-1998).

The defendants appealed, and this court affirmed in part, reversed in part, and remanded. *Yankton Sioux Tribe v. Gaffey (Gaffey II),* 188 F.3d 1010 (8th Cir.1999), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). After examining the arguments of the parties and the record they had made, we held that the Yankton Sioux Reservation had not been disestablished by the cession of surplus lands or by other means. We also held that the reservation consisted of, at a bare minimum, those lands reserved

by the 1894 Act to the United States for "agency, schools, and other purposes" and which had been subsequently returned to the Tribe by the 1929 Act. We reversed the judgment of the district court that all of the originally allotted lands continued to be part of the reservation. We concluded that those allotments which had passed out of Indian hands and into white ownership had ceased to be part of the reservation. Since the existing record was inadequate to determine the status of either the remaining trust lands or any fee lands owned by individual Indians, a remand was necessary. The remaining trust lands were comprised of allotments continuously held in trust for the Tribe or its members, as well as lands later taken into trust by the United States for the benefit of the Tribe including those acquired pursuant to the 1934 Indian Reorganization Act.

In sum, in *Gaffey II* we held that the Yankton Sioux Reservation had not been disestablished but diminished, and that it consisted of at least the agency trust lands but did not include lands which had passed into white ownership. We remanded to the district court with instructions to develop the record and make findings relevant to the status of the remaining categories of land. All parties petitioned for en banc review, which was denied. *Yankton Sioux Tribe v. Gaffey,* No. 98-3894 (8th Cir. Dec. 8, 1999) (order denying petition for rehearing with petition for rehearing en banc). The Supreme Court denied certiorari. *Yankton Sioux Tribe v. Gaffey,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

On remand the parties conducted additional discovery, after which the district court conducted a two day trial and considered a voluminous set of historical documents and government reports, along with numerous spreadsheets and area maps relevant to the various land holdings in dispute. The district court then made findings of fact and conclusions of law, settling all the contested issues about reservation status in favor of the Tribe. The district court began by recognizing our *Gaffey II* holding, including that the agency trust lands which had been returned to the Tribe were part of a diminished Yankton Sioux Reservation. The district court then determined that all outstanding allotments which had maintained their trust status – whether for the benefit of the Tribe in common or for individual members – continued to be part of the reservation. Next, the district court held that all lands taken into trust pursuant to the IRA were reservation land; the district court determined alternatively that this category of trust lands is at a minimum "de facto" reservation or a "dependent Indian community" subject to federal and tribal jurisdiction. Finally, the district court ruled that former allotments which were now owned in fee by tribal members were part of the reservation so long as such lands had never passed out of Indian ownership.

The district court also made several ancillary rulings. In particular, it held that, notwithstanding the Tribe's contrary assertion, a 1927 congressional enactment had not frozen the boundaries of the

reservation. It further held that the 1934 IRA had frozen the boundaries, but that a subsequent 1948 measure ended that freeze. The district court also rejected a claim by the defendants that 3,201 acres of land allegedly taken into trust by the United States for the benefit of the Tribe were never formally accepted into trust status and therefore cannot be considered trust lands or reservation. The district court held that such a challenge to the trust status of the lands was barred by the United States' sovereign immunity and that such immunity had not been waived by the Quiet Title Act, 28 U.S.C. § 2409a.

The district court's final judgment decreed that the agency trust lands, outstanding allotments, IRA trust lands, and Indian owned fee lands continuously held in Indian hands qualified as reservation. It denied all other claims asserted by the parties. The final judgment did not incorporate the district court's alternative holdings, and it is from that judgment that appellants and cross appellants have taken their appeals.

On their appeal, the defendants challenge the district court's conclusions that the various trust lands are part of the Yankton Sioux Reservation, either formally or informally, or that such lands support a dependent Indian community. They also persist in asking us to reconsider *Gaffey II* and continue to argue, contrary to that decision, that the reservation has been completely disestablished and that even the agency trust lands lack reservation status. Finally, they contend that the district court

erred in not considering their claim that the United States had failed formally to accept certain lands into trust. On its cross appeal, the Tribe objects to the district court ruling that the reservation boundaries are not frozen. The United States asks us to affirm the district court decision in its entirety. We review the findings of fact made by the district court in a bench trial for clear error and review de novo its legal conclusions and mixed questions of law and fact. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 804 (8th Cir.2008).

III.

Before we turn to review of the district court's findings and conclusions on remand, we must take up several preliminary issues raised there and argued again on appeal. First among these is the defendants' continuing challenge to our holding in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished.

Gaffey II squarely held that the Yankton Sioux Reservation was never disestablished and that, although diminished, the reservation continues to exist and at a minimum consists of the agency trust lands reserved to the United States for "agency, schools, and other purposes" and later returned to the Tribe. These holdings were part of the law of the case remanded to the district court. The law of the case doctrine means "that when a court decides upon a rule of law, that decision should continue to govern

the same issues in subsequent stages in the same case." *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir.2008) (internal quotation marks omitted). The appellants have presented no persuasive reasons to revisit our holding in *Gaffey II*.

We observed in *Gaffey II* that the 1894 Act reserved the agency trust lands to the federal government for the purpose of providing "aid and education to tribal members so long as they were needed." *Gaffey II*, 188 F.3d at 1029. That provision is "strong evidence that a reservation was expected to remain in existence." *Id.* at 1027. Indeed, the Supreme Court appeared to reach a similar conclusion in *Yankton Sioux Tribe*, commenting that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Based on the language of the 1894 Act and the negotiations between the Tribe and federal officials preceding it, we held in *Gaffey II* that these lands were part of an ongoing reservation. 188 F.3d at 1030.

Under the law of the case doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995) (internal quotation marks

omitted). The defendants have not met either of these conditions.

The defendants' new evidence introduced at the court trial on remand does not undermine our analysis in *Gaffey II*. They rely principally on testimony by a former official of the Bureau of Indian Affairs and an agent of the Federal Bureau of Investigation, both of whom said that they personally would exercise jurisdiction over agency trust land only so long as it was held in trust. Because these witnesses based their jurisdiction on the land's trust status as opposed to any reservation status, the defendants argue their testimony undermines the concept of a continuing reservation. According to the trial transcript, these witnesses were never asked whether the agency trust land also qualifies as reservation land, and it is far from clear that their statements reflect a considered jurisdictional distinction between reservation land and various trust properties. More importantly, their testimony sheds little light on the intentions of either the nineteenth century parties who negotiated the agreement between the Tribe and the federal government or of the Secretary of the Interior in making decisions to add trust land to an existing reservation. The defendants also point to evidence that the agency trust lands are located on two distinct parcels and are not contiguous, which is not surprising given the checkerboard nature of the allotments.

It is not clear that any of the defendants' evidence was truly "new" in the sense that it could not have reasonably been developed and presented in

earlier stages of this litigation. As another court pointed out in rejecting an attempt to challenge the law of the case with newly presented evidence, "[t]here is nothing in the record to indicate that the evidence produced at the hearing after remand was unavailable to the [litigants] during the first trial. [They] simply chose not to produce that evidence. They chose their trial strategy, litigated accordingly, and lost." *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir.1982).

Most significantly, the rulings in *Gaffey II* have not been shown to be erroneous. They were based on an exhaustive analysis of the historical materials surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history. *Gaffey II*, 188 F.3d at 1021-28.[7] As already pointed out, the Supreme Court has indicated that the agency trust land provision of the 1894 Act suggests Congress envisioned an ongoing reservation. *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Clearly the

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[7] The defendants rely on *Bruguier v. Class*, 599 N.W.2d 364 (S.D.1999), a South Dakota Supreme Court decision released one day after *Gaffey II*. *Bruguier* was a habeas case dealing with the criminal jurisdiction status of a former allotment which had passed into white ownership (a category of land which *Gaffey II* held was not part of a diminished reservation). *Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue, and none of the parties to this litigation participated in that case.

defendants disagree with much of *Gaffey II*, "but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L.Ed. 969 (1857). The law of the case as determined in *Gaffey II* continues to control this matter, and the district court did not err by following our mandate that the reservation still exists even though diminished and that it includes the agency trust lands.

The defendants also argue that two parcels of the agency trust land, totaling 106 acres, were not within the scope of the 1929 Act which returned the balance of the agency trust lands to the Tribe. These two parcels were conveyed by fee patents to the Chapter of Calvary Cathedral Episcopal Church in 1897 and in 1920. They were thus owned by that church when Congress directed in 1929 that the agency trust lands be returned to the Tribe, rather than be opened for white settlement once they were no longer needed for their intended purposes. The defendants argue that because these 106 acres were in private hands at the time of the 1929 Act, they were not within the Act's purview and are thus outside of *Gaffey II*'s holding that agency trust land "reserved to the federal government . . . and then returned to the Tribe continues to be a reservation." 188 F.3d at 1030. Whether the 1929 Act would have applied to these lands is moot, for in 1944 and 1945 the church returned these lands to the United States to be held in trust for the

Yankton Sioux Tribe. They thus comfortably fit within the holding of *Gaffey II* and are reservation land under the controlling law of this case.

IV.

We now turn to the jurisdictional questions at the heart of this case. Reservation land is by definition "Indian country," and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). Reservation status is not the only way to qualify as Indian country. Today the definition of Indian country is found in 18 U.S.C. § 1151 which was enacted in 1948 and reads in pertinent part as follows:[8]

> [T]he term "Indian country" . . . means **(a)** all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, **(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

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[8] Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well. *See Venetie*, 522 U.S. at 527, 118 S.Ct. 948.

> thereof, and whether within or without the limits of a state, and **(c)** all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
>
> Prior to the enactment of § 1151, the evolving concept of Indian country had mainly been developed and refined by the courts in their attempts to stay abreast of changing conditions in the American West and in federal Indian policy. *See Cohen,* § 3.04[2][b], at 184-88.

Congress reentered the debate in 1948 by adopting § 1151, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757, but the statute mainly codified earlier Supreme Court decisions regarding Indian country. The language in § 1151(b) is taken almost verbatim from the Court's conclusion in *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), that the federal government has a "duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *Id.* at 46, 34 S.Ct. 1. Likewise, § 1151(c) affirms the Court's holdings in *United States v. Pelican,* 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and *United States v. Ramsey,* 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), that allotments constitute Indian country and fall within the jurisdiction of the federal government and the resident tribes.

Section 1151(a) confirms that reservations are properly considered Indian country and are therefore under the primary jurisdiction of the federal government and the relevant tribes. In this sense it is in accord with such cases as *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877), and *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). It also provides that reservation land remains Indian country "notwithstanding the issuance of any patent."

Section 1151(a) thus separates the concept of jurisdiction from the concept of ownership. In doing so Congress sought both to resolve inconsistencies in prior case law, *see* 18 U.S.C. § 1151 Historical and Revision Notes, and to maintain jurisdictional continuity where reservation lands had been patented in fee, *see Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Prior to the passage of § 1151, land had generally ceased to be Indian country when Indian title was extinguished. *See, e.g., Clairmont v. United States*, 225 U.S. 551, 558, 32 S.Ct. 787, 56 L.Ed. 1201 (1912). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership. *See Seymour*, 368 U.S. at 357-58, 82 S.Ct. 424 (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership. . . .").

A.

Having ruled in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished, we remanded for the district court to consider, among other matters, the status of allotted trust lands which had retained their trust status. All sides to this litigation acknowledge, as they must, that such lands qualify at the very least as Indian country under § 1151(c), which explicitly identifies allotments as such. The disputed issue is whether these allotments are also part of the Yankton Sioux Reservation and therefore also qualify as Indian country under § 1151(a).

The distinction is important since lands which qualify only under § 1151(c) would lose their Indian country status if their governing trusts were ever terminated or revoked. If these lands also qualify as reservation, however, their Indian country status would be considerably more durable. Under § 1151(a) reservation lands retain their status "notwithstanding the issuance of any patent," including a patent which terminated a trust and conveyed the land in fee simple. After considering the evidence at trial, the district court held that the allotments were indeed part of an ongoing reservation and qualified as Indian country under § 1151(a).

The Supreme Court held in *Solem* that "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161. Furthermore, as we noted in

Gaffey II, congressional "[i]ntent to diminish or disestablish a reservation must be 'clear and plain.'" 188 F.3d at 1021 (quoting *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986)). While the 1894 Act clearly expressed Congress's intention to sever the ceded surplus lands from the reservation, *Yankton Sioux Tribe*, 522 U.S. at 337-38, 118 S.Ct. 789, Congress never expressed a similar intention with respect to the allotted lands. The simple act of dividing the Yankton Sioux Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status.

Prior to the expiration of the trust period, the allotted lands "remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control." *Pelican*, 232 U.S. at 449, 34 S.Ct. 396; *see also Mattz v. Arnett*, 412 U.S. 481, 496, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (holding that the policy of the Dawes Act "was to continue the reservation system and the trust status of Indian lands"); *United States v. Celestine*, 215 U.S. 278, 287, 30 S.Ct. 93, 54 L.Ed. 195 (1909) ("It is clear that the allotment alone could not [revoke the reservation]." (quoting *Eells v. Ross*, 64 F. 417, 419-20 (9th Cir.1894))). Furthermore, the Tribe's willingness to cede to the United States its *unallotted* lands does not indicate that the reservation status of *allotted* lands was also revoked. *Yankton Sioux Tribe*, 522 U.S. at 336, 118 S.Ct. 789 ("[W]e

have repeatedly stated that not every surplus land Act diminished the affected reservation."). More importantly, there is no indication in the historical record that either Congress or the Tribe expressly intended to eliminate the reservation status of the Yankton allotted lands immediately upon allotment or upon the sale of the Tribe's surplus holdings.

It is clear from the circumstances surrounding the Tribe's agreement to sell its surplus lands that the Tribe did not intend to relinquish immediate jurisdiction over the allotments and that it would not be required to part with them. In the discussions leading up to the agreement, a government negotiator explained to tribal members that

> [the Great White Father] wants to give you a chance to sell your surplus lands. . . . *He has told us to tell you that you will not be forced to part with your lands unless you want to. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever.*

Council of the Yankton Indians (Oct. 8, 1892), *transcribed in* S. Exec. Doc. 27, 53d Cong., 2d Sess., 47, 49 (1894) (emphasis added). These reassurances acquire particular significance in light of the longstanding rule that an agreement between the United States and an Indian tribe should be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Commercial Passenger Fishing Vessel*

Ass'n, 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (quoting *Jones v. Meehan,* 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899)).

In their report on the outcome of their negotiations with the Tribe, the federal commissioners wrote that "the purchase of the surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance. . . ." Report of the Yankton Indian Commission (Mar. 31,1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894). In particular, the Tribe was anxious to insure that annuity payments from the federal government would continue uninterrupted. The historical evidence thus reveals that the Tribe, while willing to sell its surplus, was concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands.

The final agreement, as ratified in the 1894 Act, reflects this understanding. As already noted, the Act set aside the agency trust land specifically to support the Tribe, a provision which the Supreme Court found "counsels against finding the reservation terminated." *Yankton Sioux Tribe,* 522 U.S. at 350, 118 S.Ct. 789. Furthermore, the statute ratifying the parties' agreement guaranteed to the Indian allottees the "undisturbed and peaceable possession of their allotted lands" as well as "all the rights and privileges of the tribe." 1894 Act, 28 Stat. at 317.

Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement. In the absence of such an intention, we must conclude that at the time of the Act those lands retained the same reservation status they had enjoyed since the original 1858 Treaty. Even if Congress had foreseen an eventual end to the reservation, one which would perhaps be hastened by the allotment policy,[9] such an expectation would not have been at odds to the nineteenth century mind with the ongoing maintenance of a reservation on the allotted lands. The fact that tribal members maintained beneficial property interests in the allotments is further evidence that the reservation status of those lands was preserved since at the time Indian land ownership was linked with reservation status. *See, e.g., Solem,* 465 U.S. at 468, 104 S.Ct. 1161 ("The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.").

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[9] It is worth noting that the eventual expiration of the allotments was never a foregone conclusion. The Dawes Act allowed the president to extend the allotment period, which Presidents Wilson, Coolidge, and Hoover each did. The allotments were then indefinitely extended under the 1934 Indian Reorganization Act.

In the course of setting out the twists and turns in the federal policy regarding tribal lands, *Gaffey II* recounted Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands. 188 F.3d at 1028. That original concept was not inconsistent with the maintenance of reservation status for the allotted lands so long as they were held in trust. The defendants claim that because allotments lost their Indian country status when they passed out of Indian hands, they cannot be reservation under § 1151(a) since under that subsection the Indian country status of reservation land is unaffected by ownership. The flaw in the defendants' argument is its anachronistic attempt to apply § 1151 on the basis of congressional intentions around 1894. Such nineteenth century intentions are central to our determination of whether the reservation was ever disestablished, but they cannot govern the classification of lands under the later congressional enactment of § 1151, for the 1948 enactment of § 1151(a) introduced concepts which would have been "unfamiliar at the turn of the century." *Solem,* 465 U.S. at 468, 104 S.Ct. 1161.

It is irrelevant for present purposes what the 1894 Congress expected to happen to allotments after they lost trust status, for the allotments at issue in this case have been continuously held in trust. The determinative question is simply whether they are now "reservation" within the meaning of § 1151(a). Having found no congressional intent in the 1894 Act

to divest these lands of their reservation status, we can only conclude that they remain reservation to this day, for "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Celestine,* 215 U.S. at 285, 30 S.Ct. 93; *Solem,* 465 U.S. at 470, 104 S.Ct. 1161. It follows that allotments still held in trust are "land within the limits of [an] Indian reservation under the jurisdiction of the United States Government." § 1151(a).

Any alleged inconsistency between our holding in *Gaffey II* and the district court's determination in this case that allotments are reservation land under § 1151(a) is nothing of the sort. It merely reflects the evolution of federal Indian policy and the defendants' anachronistic attempt to force a nineteenth century agreement into the mold of current legal principles.[10] The district court did not err when it concluded that all outstanding allotted lands continue to be reservation and qualify as Indian country under § 1151(a).

B.

On remand the district court was also asked to consider the status of lands taken into trust by the federal government pursuant to the Indian

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[10] As already discussed, the origins of the checkerboard pattern of the Yankton Sioux Reservation lie in the federal government's former allotment policies and its liberal issuance of fee patents under the Burke Act

Reorganization Act. The district court concluded that when lands which were once part of the original 1858 reservation were taken into trust under the IRA, they reacquired reservation status. It identified 6,444.47 acres of such land and classified them as Indian country under § 1151(a). The defendants appeal this holding while the Tribe and the United States support it.[11]

Congress passed the IRA in 1934, authorizing the Secretary of the Interior "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." IRA § 5, 25 U.S.C. § 465. The purpose of the Act was to further the independence of tribes and strengthen their ability to govern themselves. *See Cohen*, § 1.05, at 86 (The IRA was meant "to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism."). Its provisions are meant "to stabilize the tribal land base," *Nichols v.*

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[11] The defendants also claim that the United States failed formally to approve some 29 deeds conveying land in trust. These deeds affect approximately half of the IRA trust lands. The defendants argue that since the deeds were recorded without a formal acceptance by the government, the lands conveyed by them are not validly held in trust and cannot qualify as Indian country under any portion of § 1151. As the district court observed, "this case involves jurisdiction issues and does not affect title to real estate." *Podhradsky*, 529 F.Supp.2d at 1043. It pointed out that the federal government's sovereign immunity was not waived by the Quiet Title Act, 28 U.S.C. § 2409a (specifically exempting "trust or restricted Indian lands" from a more general waiver of immunity).

Rysavy, 809 F.2d 1317, 1323 (8th Cir.1987), and to that end the legislation was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains*." *Cohen*, § 1.05, at 86 (emphasis added).

The defendants argue that taking land into trust for the benefit of an Indian tribe is insufficient to convert such land into Indian country, but their position runs contrary to well settled precedent. As the Supreme Court has recognized, "[s]ection 465 provides the proper avenue for [a tribe] to reestablish sovereign authority over territory. . . ." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). This court has also acknowledged that land held in trust under § 465 is effectively removed from state jurisdiction. In *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.1978), we noted that when Congress enacted § 465 "it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation." *Id.* at 1018.[12] *See also*

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[12] The defendants point to dictum in *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997), that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. The issue in *Stands* was whether a particular parcel of land was or was not an allotment; the parties made no argument regarding the Indian country status of trust lands since that issue was irrelevant *Id* at 1572 n 3. Even so, *Stands* acknowledged that "[i]n some circumstances,

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United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir.1999) ("[L]ands owned by the federal government in trust for Indian tribes [under § 465] are Indian country pursuant to 18 U.S.C. § 1151."); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir.1985) ("[W]hether the lands [acquired pursuant to § 465] are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country.").

The Tribe and the United States assert that when former reservation land is reacquired in trust under the IRA it is not just Indian country, but a particular *type* of Indian country, namely reservation within the meaning of § 1151(a). The difference is important because Indian country under § 1151(a) has the distinct property of retaining its status "notwithstanding the issuance of any patent." In other words, such land remains part of the reservation even if sold. The defendants argue, however, that the Yankton IRA trust lands do not qualify as reservation under § 1151(a) because the Secretary of the Interior has not issued a formal proclamation to that effect. They rely on § 7 of the IRA, 25 U.S.C. § 467, which provides that the Secretary "is . . . authorized to proclaim new Indian reservations on lands acquired . . . *or* to add such lands to existing reservations" (emphasis added).

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off-reservation tribal trust land may be considered Indian country." *Id.*

While there is no doubt that § 467 requires a proclamation when the Secretary wishes to establish a new reservation, the statute does not state that a proclamation is required when the Secretary decides to add land to a preexisting reservation such as that of the Yankton Sioux. Congress left the decision to the Secretary, authorizing the Secretary "to proclaim new Indian reservations . . . or to add such lands to existing reservations." *Id.* (emphasis added). The statutory language does not itself require a proclamation in the case of preexisting reservations, and the "cardinal canon" of statutory interpretation is "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). By taking former Yankton Sioux Reservation lands back into trust under the IRA, the Secretary effectively exercised his authority to consolidate the Tribe's land base by restoring reservation status to former pieces of a reservation in existence since 1858.

When § 467 was drafted in 1934, the concept of Indian country lacked the benefit of § 1151's precise definition. Fine distinctions between reservation land, trust land, allotted land, dependent Indian communities, and the like would have carried little practical weight since jurisdiction was at the time essentially synonymous with Indian ownership. It would therefore have made sense for the congressional drafters of § 467 to provide for the Secretary to distinguish by means of a proclamation between

acquisitions of land intended to create a new reservation and acquisitions of land simply to be held in trust. Land held in trust by the federal government for addition to an existing Indian reservation would have been perceived as under federal jurisdiction even without a proclamation.

The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains.*" *Cohen*, § 1.05, at 86 (emphasis added). Indeed, a principle motivation for the IRA was to "permit progress toward the consolidation of badly checkerboarded Indian reservations." 78 Cong. Rec. 11,730 (1934) (statement of Rep. Howard). In keeping with that legislative intent, the Secretary made the decision to reacquire land in trust which had been formerly recognized as part of an existing reservation, the Yankton Sioux Reservation. This is entirely different from acquisition of land never previously recognized as under Indian jurisdiction. When the Secretary proclaims an intent to reincorporate trust land as a new reservation, it serves to give notice to all of a significant change in condition.

The parties most directly affected by a trust acquisition – the United States as trustee and the Tribe as beneficiary – both agree that the Secretary's decision to take former Yankton Sioux Reservation land into trust was sufficient to restore that land to its previous reservation status. The Secretary has preeminence in interpreting laws under the

Department's jurisdiction, *Tang v. INS*, 223 F.3d 713, 719 (8th Cir.2000) (according "substantial deference to the agency's interpretation of the statutes and regulations it administers"), and has never seen it necessary to issue a proclamation in respect to the Yankton IRA trust lands despite this extended litigation. The interests of the defendants are protected by administrative procedures in the Department of the Interior in which trust acquisitions are balanced against a multitude of factors, including "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. § 151.10(f).

The regulations reflect that the acquisition of former reservation land is likely to pose fewer problems than an acquisition of land which has no historical connection to a tribe's land base. Current regulations treat trust acquisitions of former reservation lands as "on reservation" rather than "off reservation" transactions, *see* 25 C.F.R. § 151.2(f) (defining reservation to include "that area of land constituting the former reservation"), and subject them to less searching scrutiny. For example, if a tribe requests an off reservation acquisition – that is, one involving land which is not nor ever has been part of a reservation – the regulations require the Secretary to consider "[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation." 25 C.F.R. § 151.11(b). If off reservation land is being acquired for business purposes, "the tribe shall provide a plan which specifies the anticipated economic benefits." *Id.* § 151.11(c).

Such regulations are consistent with our own analysis that restoration through the IRA of territory historically part of the Yankton Sioux Reservation is distinguishable from the acquisition of lands never within Indian domain and may be accomplished without a proclamation.

Moreover, the defendants can cite no statutory language or case law making an official proclamation necessary before former reservation lands can reacquire their reservation status. The only case they point to involved the establishment of a new reservation, not the return of former reservation land to an existing one, and is thus inapposite. *See Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C.Cir.2007).

The defendants also argue that treating trust acquisitions of former reservation land differently from other acquisitions would grant significance to the 1858 boundaries despite the Supreme Court's determination in *Yankton Sioux Tribe*, and our own conclusion in *Gaffey II*, that the original boundaries have been altered by the reservation's diminishment. While it is true that the original 1858 boundaries are no longer markers dividing jurisdiction between the Tribe and the state, that does not mean to say they have lost their historical relevance for the Secretary's discretionary acts. Defendants argue that the IRA's legislative history, the Department of the Interior's internal guidelines, and the *Cohen* handbook stand for the proposition that some official action beyond

the acquisition of land is necessary when adding trust land to an existing reservation.

Here, the lands under consideration were part of this tribe's 1858 reservation and have been reacquired in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. We believe this presents a distinct question, one which the sources cited by the defendants simply do not resolve. There is a fundamental difference between acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base. While Congress has provided that an official proclamation by the Secretary is necessary for adding such unrelated land to a reservation, it has not required it for the latter. The district court did not err in its conclusion that all lands taken into trust by the Secretary under § 465 fall within the jurisdiction of the Yankton Sioux Reservation and qualify as Indian country under § 1151(a).

C.

Although the district court identified 174.57 acres of miscellaneous land acquired in trust other than under the IRA, it did not directly address the status of these miscellaneous lands. Its separate discussion of dependent Indian communities was broad enough to cover all trust properties, however, including the miscellaneous plots.

In *Venetie* the Supreme Court noted that it had not yet "had an occasion to interpret the term

'dependent Indian communities'" as the term is used in § 1151(b). 522 U.S. at 527, 118 S.Ct. 948. In construing the term for the first time, the Court held that "it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.*

The miscellaneous trust lands easily meet this definition. The lands were acquired for the use and benefit of the Yankton Sioux Tribe, and the district court found that the federal Bureau of Indian Affairs "negotiates the leases, collects the rents and distributes the rents according to tribal status reports" with respect to these lands. *Gaffey I,* 529 F.Supp.2d at 1055. Testimony by a Federal Bureau of Investigation agent confirmed that the federal government exercises criminal jurisdiction over these trust lands. *Id.* This is more than enough to meet the standard for Indian country under § 1151(b). *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (concluding that "property . . . held by the Federal Government in trust for the benefit" of a tribe qualifies as Indian country).

The defendants argue that the federal government's administration of these lands in trust is insufficient to meet the Supreme Court's definition of dependent Indian communities as it was announced and applied in *Venetie.* That case involved lands held

under the Alaska Native Claims Settlement Act (ANCSA), Pub.L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*). ANCSA was specifically "intended to avoid a 'lengthy wardship or trusteeship.'" *Venetie*, 522 U.S. at 533, 118 S.Ct. 948. As the Court observed, ANCSA explicitly eliminated the Venetie Reservation and transferred the lands "to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33, 118 S.Ct. 948. The land at issue in *Venetie* thus had virtually no resemblance to the Yankton Sioux trust land. Conveyance of the latter remains subject to the Secretary's oversight and approval, and the government continues to hold title to the land in trust, to administer leases on it, and to provide law enforcement services on it.

Consequently, we conclude that the miscellaneous trust lands at issue in this case qualify as dependent Indian communities and are Indian country under § 1151(b).

D.

The Tribe and the United States also urge us to uphold the district court's determination that former allotments which have been continuously held in fee

by Indian owners constitute reservation land. The defendants seek reversal.[13]

Although we might assume that such lands exist, the record does not identify any or their relevant histories. We therefore conclude that this issue is not ripe for resolution. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir.2000). In *Nebraska Public Power District*, we held that "to resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution." *Id.* at 1039.

Here, a number of potentially important facts are missing with respect to Indian owned fee lands continuously held by tribal members. To start, no one has identified which, if any parcels, fit within this category. Moreover, the status of such lands may depend on a number of unknown factors, including whether the allotments expired at the natural end of the trust period, whether the fee patents were issued

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[13] The defendants maintain that our mandate in *Gaffey II* limited the district court to an analysis of trust lands. This is incorrect, for we noted that the record then before us was insufficient to address the issue of fee lands continuously held in Indian ownership, 188 F.3d at 1030, and remanded "for further proceedings consistent with this opinion," *id* at 1031 There was no explicit or implicit instruction limiting the district court to consideration of trust lands.

at the request of allottees, or whether the fee patents were "forced" on allottees pursuant to the Burke Act. After deciding that this category of land remained reservation, the district court noted that many of these historical facts could be developed by consulting "the land title records maintained by the BIA's Realty Office." *Podhradsky,* 529 F.Supp.2d at 1056-57. Such facts are currently absent in the record before us, and general conclusory descriptions do not clarify who can exercise jurisdiction over an area. Without the benefit of a fully developed record on these issues, we decline to consider this question and accordingly vacate that portion of the district court's decision and judgment.

E.

The Tribe further asserts that two Congressional enactments – the Act of March 3, 1927, § 4, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. § 398d) (1927 Act), and the 1934 IRA – froze the boundaries of the reservation. Consequently, it argues, any lands alienated in fee to whites during the effective period of any such freeze should be considered part of the reservation. The district court determined, however, that the 1927 Act does not apply to the Yankton Sioux Reservation and that whatever freeze the IRA may have imposed was lifted by the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act). The United States and the defendants ask us to uphold the district court rulings on these issues.

With respect to the 1927 Act, the Tribe maintains that the statute prohibited alterations to the boundaries of any Indian reservation except by act of Congress. The defendants respond that the plain terms of the 1927 Act limit its application to reservations created by executive action rather than by treaty. The district court agreed with the defendants and concluded that the statute was inapplicable in the current dispute.

By the mid nineteenth century, Presidents "had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Sioux Tribe of Indians v. United States,* 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). Although there were initial questions about the legitimacy of these "executive order" reservations, any doubts were removed by *United States v. Midwest Oil Co.,* 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915), in which the Supreme Court held that the President has the power to withdraw lands from the public domain even in the absence of express statutory authority. These executive order reservations are nonetheless distinguishable from those created by treaty or by act of Congress.

The language of the 1927 Act does indeed limit its application to executive order reservations: "[H]ereafter changes in the boundaries of reservations created by *Executive* order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress. . . ." 44 Stat. at 1347 (emphasis added). The natural meaning of

this language is that it applies only to reservations created by the executive branch, whether by executive order, executive proclamation, or other executive action, and *Sioux Tribe of Indians* recognizes as much. 316 U.S. at 325 n. 6, 62 S.Ct. 1095 ("In 1927, Congress added a provision that any future changes in the boundaries of *executive order reservations* should be made by Congress alone." (emphasis added)). The Yankton Sioux Reservation was created by the 1858 Treaty, is not an executive order reservation, and is therefore outside the freeze contemplated by this statute.

The Tribe also argues that the 1934 IRA froze the reservation's boundaries. Section 2 of that act indefinitely extended the trust period for all outstanding allotments, 48 Stat. at 984 (codified at 25 U.S.C. § 462), while § 4 states that "[e]xcept as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands . . . shall be made or approved. . . ." *Id.* at 985 (codified as amended at 25 U.S.C. § 464). The district court concluded that these provisions effectively froze any further diminishment of the Yankton Sioux Reservation, but it also concluded that the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act), lifted whatever freeze was imposed. *See Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett,* 708 F.2d 326, 330-31 (8th Cir.1983) (concluding that the Sales Act lifted restrictions).

We have never squarely confronted the effect of the IRA on the Secretary's authority under the Burke

Act to issue fee patents to "competent" allottees, thereby removing trust restrictions on the alienation and conveyance of Indian lands. However, in *Oglala Sioux Tribe*, we assumed without deciding that the IRA had effectively frozen the Secretary's ability to issue fee patents. *Id.* at 330. In the same case, we also determined that the Sales Act had lifted any such freeze. *Id.* at 330-31.

The Tribe argues that allotments on the Yankton Sioux Reservation were unaffected by the Sales Act since they had been granted under the Dawes Act and the 1891 Act, not under the IRA. While it is true that by its terms the Sales Act applies to allotments "held . . . under" the IRA, 25 U.S.C. § 483, we concluded in *Oglala Sioux Tribe* that by extending indefinitely the trust periods of previously awarded allotments, the IRA brought within its protection even allotments awarded prior to its enactment. 708 F.2d at 331. In other words, the Yankton Sioux allotments, although originally granted under the Dawes Act and the 1891 Act, would have expired but for the IRA's extension of the trust period. That is enough for them to be "held . . . under" the IRA. "[T]he allotments would not be 'held' . . . at all without the Indian Reorganization Act." *Id.* Since the trust periods on the Yankton allotments would have expired but for the IRA, they are "held" under that statute and any freeze imposed on their conveyance was lifted by the Sales Act.

The Tribe argues that even if the Sales Act did undo an IRA imposed freeze, land conveyances in fee to whites during the effective period of the freeze

were improper and should be disregarded for the purpose of defining the reservation's current boundaries. The Tribe's arguments suffer from an insufficient factual record, however. As the district court noted with respect to the Tribe's 1934 freeze claim, "no proper foundation was established for the admission of . . . evidence" indicating that any land would have been affected by such a freeze. *Gaffey I*, 529 F.Supp.2d at 1051. We conclude that the Tribe's claim that the reservation boundaries were frozen in 1934 is not ripe for resolution on the record before the court.

V.

In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a). Furthermore, lands originally part of the Tribe's 1858 reservation regained their status as reservation land under § 1151(a) when acquired in trust under the Indian Reorganization Act. The miscellaneous trust lands, by contrast, qualify as part of a dependent Indian community and are therefore Indian country under § 1151(b). Finally, the record regarding fee lands continuously held by tribal members is not ripe for review.

With respect to the judgment of the district court, we therefore:

(1) affirm insofar as it concluded that the agency trust lands, the outstanding allotments, and the IRA trust lands are part of the Yankton Sioux Reservation and are Indian country under § 1151(a),

(2) affirm its alternative holding that the miscellaneous trust lands constitute a dependent Indian community and are Indian country under § 1151(b),

(3) vacate the district court's holding that fee lands continuously held in Indian ownership are reservation under § 1151(a), and

(4) affirm its denial of all other claims for relief.

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606 F.3d 985

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,
v.
Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,
Southern Missouri Waste Management District, Interested Party.
Rosebud Sioux Tribe, Amicus on behalf of Appellees.
Nos. 08-1441, 08-1488.

May 6, 2010.

Order on Petitions for Rehearing.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

Appellant officials of the State of South Dakota and Charles Mix County filed petitions for rehearing and rehearing en banc of the court's August 25, 2009 decision in this matter. The Yankton Sioux Tribe and the United States filed their individual responses to the petitions on January 25, 2010, supporting the

court's decision and judgment. Now before the court are the petitions for panel rehearing.

In the meantime we have permitted amici to file six briefs in support of the petitions[1] and granted a motion by the state appellants to file a supplement to their petition. Still pending are motions by the Rosebud Sioux Tribe to file an amicus brief opposing the petitions and by the county appellants to file a supplemental petition for rehearing and rehearing en banc. The United States and the Yankton Sioux Tribe have filed oppositions to the county appellants' motion, which was filed the same day as the responses to the original petitions. The Tribe has also argued that the new factual materials submitted by the state appellants in their petition and the supplement thereto should be stricken.

Recently petitioners filed a joint motion on April 6, 2010 seeking leave to amend their petitions for rehearing to include new arguments based on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-21, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005), and also proposing that the court "remand this case to the district court to allow the district court an opportunity to consider

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[1] The amici supporting the petitions are the Charles Mix Electric Association, several South Dakota counties which include former Indian allotments, the Wagner Community School District, the Southern Missouri Waste Management District, several cities within the original boundaries of the Yankton Sioux Reservation, and a number of individuals who own land within the original boundaries of the reservation.

[*City of Sherrill*], or in the alternative, determine the case in [their] favor . . . or, in the further alternative, allow the parties to fully brief the issues for the panel and the Court." Motion to Support Proposed Amendment to State and County Petitions for Rehearing and Rehearing en Banc at 1. The Tribe and the United States filed responses in opposition to this belated motion on April 16, 2010.

Petitioners based their original requests for rehearing on two primary grounds. They object to some language in our 2009 opinion touching on former allotments within the original boundaries of the Yankton Sioux Reservation which were patented in fee after 1948. Petitioners also renew their earlier unsuccessful arguments that the Yankton Sioux Reservation has been disestablished, continuing to disagree with the decision to the contrary reached more than ten years ago after extensive litigation in *Yankton Sioux Tribe v. Gaffey (Gaffey II)*, 188 F.3d 1010 (8th Cir.1999), *reh'g* and *reh'g en banc denied*, *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

What petitioners have generally not done in their petitions for rehearing is to attack the judgment actually rendered by the court on August 25, 2009. Instead, they raise a virtual smokescreen by focusing on dicta in a single footnote of our 37 page decision.[2]

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[2] Footnote 10 in the opinion read as follows:

It is unclear from the record whether any allotments have been patented in fee since 1948 and subsequently

(Continued on following page)

The second and third sentences of that footnote are the basis from which petitioners mount their attack, but these sentences did not speak to any matter actually litigated or decided in this case. Nor was such language ever incorporated into our judgment which only determined the status of trust lands within the former boundaries of the Yankton Sioux Reservation, our judgment in *Gaffey II* having determined that the reservation had never been disestablished.

That petitioners are well aware of the limited scope of our judgment is evidenced by the county's letter proposing that the language which they attack be added to the court's judgment. Letter from Tom D. Tobin to Michael E. Gans, Clerk of Court (Nov. 5, 2009) (noting that the proposition that "allotments patented in fee since 1948 and now held by non-Indians continue to be Indian country under the terms of 18 U.S.C. § 1151(a) . . . does not appear to be included or set forth in the paragraph at the conclusion of the opinion" and requesting that the clerk bring that "possible oversight" to the attention of the court). In drafting the judgment in Part V of the August 2009 opinion the court acted intentionally in stating all matters it actually decided in this case.

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sold to white owners. If such lands exist, however, they would continue to be Indian country under the clear terms of § 1151(a). The holding in *Gaffey II* that lands which passed into white ownership lost reservation status thus only applies to pre 1948 conveyances.

In sum, petitioners raise objections to issues which the court did not decide and which are beyond the scope of this litigation. They raise concerns about the possible consequences of a decision which the court has not reached. Since the language on which petitioners have focused is extraneous to what was actually decided by the court, we will grant the petitions for rehearing for the limited purpose of withdrawing the opinion filed on August 25, 2009 and replacing it with a revised opinion. The revised opinion contains the identical judgment but eliminates footnote 10 and several textual asides touching on matters not litigated or decided, but which have possibly been misunderstood.

I.

The long history of this litigation which began in 1994 is set out in detail in our decision. *Yankton Sioux Tribe v. Podhradsky (Podhradsky II)*, 577 F.3d 951, 959-60 (8th Cir.2009). The latest chapter of the case was initiated by our 1999 remand to the district court in *Gaffey II*, a decision on which the Supreme Court denied certiorari. *Gaffey II* held that the Yankton Sioux Reservation was never disestablished and that some original agency lands identified by the Supreme Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 350, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), remained part of a continuing reservation. *See Gaffey II*, 188 F.3d at 1030. We observed that the record before the court was inadequate to "define the precise limits" of the remaining

reservation, particularly with respect to lands within the original boundaries of the reservation which were held in trust. *Id.* We therefore remanded for the district court to develop a record concerning such trust lands. *Id.* at 1030-31.

After our remand the district court held a trial[3] and then determined that three categories of trust lands remain part of the Yankton Sioux Reservation under 18 U.S.C. § 1151(a): (1) land which was reserved to the federal government in the 1894 Act and then subsequently returned to the Tribe; (2) land which had been allotted to individual Indians and was still held in trust; and (3) land which was taken into trust under the Indian Reorganization Act of 1934. *Yankton Sioux Tribe v. Podhradsky (Podhradsky I)*, 529 F.Supp.2d 1040, 1058 (D.S.D.2007). These conclusions fit squarely within the scope of our remand order. The district court went beyond the specific directions of our mandate in one respect, however, in that it also addressed land continuously owned in fee by individual Indians. The district court concluded that such land remained part of the reservation and denied all other claims for relief. *Id.* Both sides appealed.

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[3] During a two day trial the district court took testimony and admitted numerous documents. The record includes thousands of pages relating to more than 150 tracts of land, including deeds, title reports, and correspondence concerning BIA management of the trust lands. It also includes numerous maps as well as legislative and administrative materials related to the reservation and its status to relevant federal authorities.

Our subsequent opinion affirmed the judgment of the district court in respect to each category of trust land and affirmed its alternative holding that miscellaneous trust lands were a dependent Indian community under § 1151(b). *Podhradsky II,* 577 F.3d at 974. We vacated one portion of the district court's judgment, however. That portion which held that fee lands continuously owned by Indians were part of the diminished reservation was vacated because the record remained inadequate to determine the status of such lands. *Id.* at 972, 974. Finally, we affirmed the denial of all other claims. *Id.* at 974.

Our mandate to the district court in *Gaffey II,* the district court's judgment on remand in *Podhradsky I,* and our judgment on this appeal (*Podhradsky II*) concerned specific, discrete issues-namely, the status of some 37,000 acres of trust land within the original boundaries of the Yankton Sioux Reservation. The only other category of land ruled on by the district court was fee land continuously owned by Indians, and we vacated that part of the district court's judgment. Our own August 2009 judgment in *Podhradsky II* was explicitly limited to trust lands.

II.

Rather than focusing on the actual judgment, petitioners focus on the undeveloped suggestion in footnote 10 of our opinion that 18 U.S.C. § 1151(a) might be applied to former allotments patented in fee after the statute's enactment in 1948. By claiming

that the presence of this hypothesis unrelated to our holdings and never incorporated into our conclusions or judgment "abruptly transformed the status of at least 7,250 acres of land," petitioners have raised a straw man to attack. State Appellants' Petition for Rehearing and Petition for Rehearing En Banc at 1. They have then spun out some possible consequences if the court had decided what they protest, raising fears about land owned by local government entities such as the Wagner Community School District and the Wagner Fire Protection District. See Charles Mix County's Petition for Rehearing and Petition for Rehearing En Banc at 8. Their amici go further in claiming "devastating effects" if the Yankton Sioux Tribe were able to impose taxes and various regulations on non Indian landowners. Brief of Leonard Kreeger et al. as *Amicus Curiae* in Support of State and County Petitions at 4-5.

In their responses neither the Tribe nor the United States focus on footnote 10, but they assert that petitioners' fears are overblown. The Tribe argues that speculation about any potential future impact is not a sufficient basis for rehearing. The United States points out that "[d]espite a decade of experience with a post-*Gaffey* checkerboard Reservation, this area of South Dakota has not experienced any of the problems described by the State, County or *amici*." United States' Response to the Petitions for Panel Rehearing Filed by the State of South Dakota and Charles Mix County at 4 n. 2.

We need not address each individual point petitioners raise because they are well aware that the wording to which they object is not part of the judgment in this case, as evidenced by the county's suggestion for its incorporation. The status of fee lands not owned by Indians was not considered or decided by the district court, nor was the issue litigated on appeal. The record remains inadequate to decide the status of such lands, just as it was inadequate to decide the status of Indian owned fee lands. *See Podhradsky II,* 577 F.3d at 971-72. The final two sentences in footnote 10 and other extraneous language were in the nature of a hypothetical reflection stimulated by study of shifting federal Indian policy over the years. Because these dicta were not incorporated into the judgment, they are not binding upon the parties and do not provide a reason to revisit the substance of our decision. *See Coen v. American Sur. Co. of New York,* 120 F.2d 393, 400 (8th Cir.1941); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.,* 333 F.3d 763, 766 (7th Cir.2003); *cf. ACLU of N.J. v. Schundler,* 168 F.3d 92, 98 n. 6 (3d Cir.1999) (standards for rehearing en banc "look to the panel's *decision,* not to the panel's dicta") (emphasis in original). They should therefore be eliminated from the decision.

III.

The second ground upon which petitioners seek rehearing is their continuing effort to disestablish the Yankton Sioux Reservation. In *South Dakota v.*

Yankton Sioux Tribe, the Supreme Court declined to adopt their proposition that the reservation was disestablished by the 1894 congressional ratification of an agreement with the Tribe that ceded certain reservation lands to the United States. 522 U.S. at 357-58, 118 S.Ct. 354. The Court also declined to answer the question of whether the Yankton Sioux Reservation had been diminished beyond the loss of those unallotted lands specifically severed in the agreement. *Id.* Instead, the Court recognized arguments on both sides of the issues and remanded the question for determination by the lower courts. Since the Supreme Court's decision, petitioners have unsuccessfully pressed their disestablishment argument twice before the district court, *see Yankton Sioux Tribe v. Gaffey (Gaffey I),* 14 F.Supp.2d 1135, 1137 (D.S.D.1998); *Podhradsky I,* 529 F.Supp.2d at 1043-44, and twice before this court, *see Gaffey II,* 188 F.3d at 1015; *Podhradsky II,* 577 F.3d at 961.

At each level their disestablishment arguments have been squarely rejected after thorough study of the record and exhaustive consideration of the precedents. *Gaffey II*'s 1999 holding that the Yankton Sioux Reservation was never legally disestablished is the law of the case. *See Podhradsky II,* 577 F.3d at 962-63. We also note that the Supreme Court chose not to grant certiorari on the issue in 2000. Petitioners have again failed to show that the court's decision was incorrect. Moreover, they have pointed to no facts or legal authority previously overlooked by the court which would support reconsideration of that

determination. "The purpose of a petition for rehearing . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *NLRB v. Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir.1953); *see also* Fed. R.App. P. 40(a)(2); 16A Charles Alan Wright, Arthur R, Miller, & Edward H. Cooper, Federal Practice & Procedure § 3986.1 (4th ed. 2008) ("It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings.").

Petitioners do seek support for their disestablishment argument in a recent Tenth Circuit decision, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir.2010). In *Osage Nation*, the Nation sought a declaration that its members residing and employed in Osage County, Oklahoma were exempt from paying state income tax because the county was still Indian country. *See id.* at 1120. The court concluded, however, that the Osage Nation's former reservation had been disestablished by a 1906 Act of Congress. *Id.* That 1906 statute has no equivalent in the history of the Yankton Sioux, and the respondents argue that *Osage Nation* is not in any way inconsistent with our decision in this case. We agree.

Osage Nation addressed a unique surplus land act and a reservation with a historical context unlike that of the Yankton Sioux Reservation. Applying familiar legal principles, the Tenth Circuit discerned

from the circumstances surrounding the passage of the Osage Allotment Act that there was "clear congressional intent and Osage understanding that the reservation would be disestablished." *Id.* at 1124. In contrast, the 1894 Act which ceded surplus land from the Yankton Sioux Reservation reflected the parties' intent to "preserv[e] the support of the federal government and its superintendence over [the allotted] lands." *Podhradsky II,* 577 F.3d at 966 (*citing* Report of the Yankton Indian Commission (Mar. 31, 1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894)).

Neither the language of the 1894 Act dealing with the land of the Yankton Sioux Reservation nor the circumstances surrounding its passage evinced a clear congressional intent to disestablish the reservation. Absent such clear intent, the reservation remains for "*[o]nce a block of land is set aside for an Indian Reservation . . .* [it] *retains its reservation status until Congress explicitly indicates otherwise.*" *Solem v. Bartlett,* 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984) (emphasis added). *Osage Nation* in fact supports our decision in *Podhradsky II,* for it recognized that "Congress's intent to terminate [a reservation] must be clearly expressed, and there is a presumption in favor of the continued existence of a reservation." *Osage Nation,* 597 F.3d at 1122 (*citing Yankton Sioux Tribe,* 522 U.S. at 343, 118 S.Ct. 789 and *Solem,* 465 U.S. at 472, 104 S.Ct. 1161).

IV.

The state appellants also seek rehearing on the ground that the court wrongly determined that lands within the former boundaries of the Yankton Sioux Reservation which were taken into trust under the Indian Reorganization Act are part of the reservation under § 1151(a). They argue that under 25 U.S.C. § 467, such reacquired lands cannot become part of a reservation unless the Secretary of the Interior has made a formal proclamation to that effect. Petitioners also claim that our decision conflicts with *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997). As the United States points out, however, these contentions essentially recapitulate arguments already raised and correctly addressed on appeal. *See Podhradsky II*, 577 F.3d at 968-69.

As we have explained, 25 U.S.C. § 467 does not require a proclamation from the Secretary when that official "decides to add land to a preexisting reservation such as that of the Yankton Sioux." *Id.* at 969. Rather, the statute authorizes the Secretary both "to proclaim new Indian reservations . . . *or* to add such lands to existing reservations." *Id.* at 968-69. (*quoting* 25 U.S.C. § 467) (emphasis in original). Congress thus explicitly provided for land to be added to existing reservations without a proclamation. Because the IRA trust lands in this case were simply returned to an existing reservation, no proclamation was necessary to restore their reservation status.

Petitioners rely on *Stands* for the proposition that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Stands*, 105 F.3d at 1572. This argument was directly addressed in our decision. *See Podhradsky II*, 577 F.3d at 968 n. 13. The language in *Stands* on which petitioners rely is classic dicta. The question on which the case turned was not whether any trust lands were part of a reservation, but simply whether a particular plot of land was "an Indian allotment, the Indian title to which has not been extinguished." *Stands*, 105 F.3d at 1571. The *Stands* court neither considered nor decided matters bearing directly on the status of the IRA trust lands in this case.

The petitions for rehearing merely reiterate arguments related to the IRA trust lands which were already soundly rejected on appeal, and they consequently fail to satisfy the standards for panel rehearing.

V.

We turn finally to the pending motions. Despite over fifteen years of litigation and the voluminous record in this case, petitioners now seek to add more factual information in support of their petitions. To that end, the state appellants filed with their petition for rehearing six maps intended to illustrate the jurisdictional changes wrought at various stages of this litigation. Only two of these maps were previously in the record (maps D and E). The county

appellants also filed copies of each of these maps with their petition, along with an affidavit of Jo Ann Mazourek, the Director of Equalization for Charles Mix County, summarizing her examination of records relating to former allotments patented in fee after 1948.

On January 13, 2010 we granted the state appellants' motion to file a supplement to their petition containing a revised affidavit by Ms. Mazourek stating that 8,939.47 acres of land left allotted status and were patented in fee after the 1948 enactment of 18 U.S.C. § 1151, and Map G, which shows the locations of those fee parcels. Her affidavit also suggests that, based upon her assessment of whether the titleholder has an Indian name or not, over 90 percent of that fee land is not owned by Indians today.

The county appellants also moved on January 25, 2010 to file a supplemental petition for rehearing and for rehearing en banc. That supplemental petition included additional argument attacking the court's decision, copies of the revised Mazourek affidavit and Map G, 22 pages of quoted excerpts from various treatises and judicial opinions, and an excerpt from the transcript of the 1998 oral argument before the Supreme Court in *South Dakota v. Yankton Sioux Tribe*.

The Tribe argues that the maps and affidavits not in the record when the court reached its decision must be stricken. We agree. New factual material may be considered on a petition for rehearing only in

the rarest circumstances. *See Smith v. Armontrout*, 865 F.2d 1502, 1505 n. 5 (8th Cir.1988). This case falls within the rule, not the exception, particularly because the proposed new information concerns matters not decided by the court or necessary to its decision. Accordingly, maps A, B, C, F, and G, and the Mazourek affidavits should be stricken from the record.

The Tribe and the United States also argue that the county appellants' motion to file a supplemental petition for rehearing should be denied. The factual exhibits included with the county's supplemental petition were already filed by the state appellants with their supplement. Aside from those duplicative materials, the supplemental petition largely restates earlier arguments and seeks to buttress them with extensive unanalyzed quotations from legal texts. To the limited extent the supplemental petition offers new arguments, there is no apparent reason they could not have been included in the original petition. We see no reason to permit the filing of what amounts to an overlength petition more than two months after the already extended filing deadline. To do so would unnecessarily prolong this already extended process. The county appellants' motion should therefore be denied.

The Rosebud Sioux Tribe's motion for leave to file an amicus brief should be granted, just as were the motions of the amici supporting petitioners.

Finally, petitioners' April 2010 motion to enlarge their petitions must be denied. In that motion, petitioners argue that *City of Sherrill* supports both their disestablishment claim and their claim that former allotments patented in fee after 1948 are not part of the reservation. As to the first issue, the Tribe points out that the lands at issue in *City of Sherrill* were located in an area with less than one percent Indian population and out of Indian hands for some 200 years. *City of Sherrill*, 544 U.S. at 211, 216, 125 S.Ct. 1478.

We need not examine the significant differences between *City of Sherrill* and the present case in any detail because it is far too late for petitioners to present an entirely new theory in support of disestablishment. Petitioners have not previously relied upon that 2005 case, nor did they raise the equitable doctrines on which it relies in the district court, on appeal, or even in their petitions for rehearing. "Panel rehearing is not a vehicle for presenting new arguments," *Easley v. Reuss*, 532 F.3d 592, 593-94 (7th Cir.2008) (per curiam), and we do not ordinarily consider arguments raised for the first time in a petition for rehearing, *see In re Hen House Interstate, Inc.*, 177 F.3d 719, 724-25 (8th Cir.1999) (en banc). Petitioners have had years to develop their litigation strategy, and *City of Sherrill* was decided more than two years before the parties briefed the merits of the current dispute in the district court. Petitioners "can not now, after failing to prevail on [their] original theories, invoke an entirely new theory in support of"

their position. *United States v. Klotz*, 503 F.2d 1056, 1056 (8th Cir.1974) (per curiam). As for the post 1948 fee lands, their status was not part of our 1999 remand to the district court (or its decision) and was not determined in our 2009 decision and judgment. Petitioners' recent motion for a renewed remand to the district court thus seeks not only to raise a new argument, but entirely new claims related to a category of lands not at issue below or on appeal. It of course remains open to the parties to file new actions in the district court if they choose. A remand to the district court of issues beyond the scope of this lengthy litigation would be wholly inappropriate.

VI.

This order as well as the amended opinion will moot some issues in the current petitions for rehearing and rehearing en banc. All of the parties should therefore have the opportunity to file any new petitions within 45 days from the entry of this order and of the amended opinion.

VI.

For the foregoing reasons it is hereby ordered that:

(1) The petitions for panel rehearing are granted to the extent that the dicta discussed herein shall be stricken from the court's opinion filed in this case on August 25, 2009;

(2) The opinion filed in this matter on August 25, 2009 and reported at 577 F.3d 951 is withdrawn and our amended opinion shall be substituted and filed concurrently with this order;

(3) The Rosebud Sioux Tribe's motion for leave to file an amicus brief is granted;

(4) The motion of Charles Mix County for leave to file a supplemental petition for rehearing is denied;

(5) Maps A, B, C, F, and G, and the affidavits of Jo Ann Mazourek filed with the petitions for rehearing and the state appellants' supplement are stricken from the record; and

(6) PETITIONERS' MOTION FOR LEAVE TO AMEND THE PETITIONS FOR REHEARING IS DENIED. THE REQUESTS IN THE MOTION FOR DECISION IN PETITIONERS' FAVOR, REMAND, OR FURTHER BRIEFING ARE ALSO DENIED..

(7) Any new petitions for rehearing and rehearing en banc shall be filed within 45 days of the entry of this order and of the amended opinion.

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577 F.3d 951

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellees/Cross-Appellants,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,
v.
Scott J. PODHRADSKY, State's Attorney of Charles Mix County; C. Red Allen, member of the Charles Mix, South Dakota, County Commission; Keith Mushitz, member of the Charles Mix, South Dakota, County Commission; Sharon Drapeau, member of the Charles Mix, South Dakota, County Commission; M. Michael Rounds, Governor of South Dakota; Lawrence E. Long, Attorney General of South Dakota, Defendants-Appellants/Cross-Appellees,
Southern Missouri Waste Management District,
Interested Party.
Rosebud Sioux Tribe, Amicus on behalf of Appellees.
Nos. 08-1441, 08-1488.

Submitted: March 11, 2009.
Filed: Aug. 25, 2009.

Rebecca L. Kidder, Rapid City, SD, argued, for Appellee Yankton Sioux Tribe.

Mark E. Salter, Asst. U.S. Atty., Sioux Falls, SD, argued (Jan Leslie Holmgren, Asst. U.S. Atty., on the brief), Katherine Wade Hazard, U.S. Department of Justice, Washington, DC, for Intervenor Plaintiff-Appellee.

Tommy D. Tobin, Winner, SC [sic], argued, for appellants Podhradsky, Allen, Mushitz, Drapeau and Southern Missouri Waste Management District.

John P. Guhin, Asst. Atty. Gen., Pierre, SD, argued (Meghan N. Dilges, Asst. Atty. Gen., on the brief), for appellants Long and Rounds.

Kenneth W. Cotton, Wipf & Cotton, Wagner, SD, on the brief, for Southern Missouri Waste Management District.

Terry L. Pechota, Pechota Law Office, Rapid City, SD, argued (Eric John Antoine, Rosebud Sioux Tribe, Rosebud, SD, on the brief), for Amicus on behalf of appellees.

Before MURPHY, MELLOY, and SHEPHERD, Circuit Judges.

MURPHY, Circuit Judge.

In this action the Yankton Sioux Tribe (Tribe) and its members sought declaratory and injunctive relief against officials of Charles Mix County[1] and the State of South Dakota[2] in respect to the boundaries of the Yankton Sioux Reservation. In an earlier stage of the case we held that the Tribe's 1894 cession of certain

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[1] Scott Podhradsky, state's attorney for Charles Mix County, and individual members of the county commission. During the course of this consolidated litigation, Podhradsky replaced Matt Gaffey as state's attorney and first named defendant.

[2] Governor Michael Rounds and Attorney General Lawrence Long

land to the United States had diminished, rather than disestablished, the reservation and that some land retained reservation status. *Yankton Sioux Tribe v. Gaffey (Gaffey II),* 188 F.3d 1010 (8th Cir.1999), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). We remanded to the district court for further development of the record and for "findings relative to the status of Indian lands which are held in trust." *Gaffey II,* 188 F.3d at 1030.

An earlier action had been filed by the Tribe against the Southern Missouri Waste Management District (Waste District), seeking a declaration that the 1858 boundaries of the reservation remained intact and that therefore a particular site at issue was subject to federal environmental regulation. After the Tribe prevailed in the district court and on appeal, *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.,* 890 F.Supp. 878 (D.S.D.1995), *aff'd,* 99 F.3d 1439 (8th Cir.1996), the Supreme Court reversed. In *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Yankton Sioux Reservation had been diminished by the Tribe's cession of certain lands to the United States in 1894 and that the parcel at issue in the Tribe's dispute with the Waste District was not reservation land.[3] The Court remanded for

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[3] The Tribe has never dismissed its action against the Waste District which remains an inactive interested party, not having filed a notice of appeal The district court observed that

(Continued on following page)

determination of the larger question of whether the Yankton Sioux Reservation had been disestablished or diminished.

On remand the original case was consolidated with this separate action against the county and state officials in which the Tribe seeks a declaratory judgment that all land not ceded to the United States in 1894 remains part of the Yankton Sioux Reservation under the jurisdiction of the Tribe and the federal government. The United States intervened on its own behalf and for the benefit of the Tribe. The district court ruled in favor of the Tribe, concluding that the reservation had not been disestablished but consisted of all land not ceded in 1894 as well as certain reserved "agency trust lands." *Yankton Sioux Tribe v. Gaffey (Gaffey I),* 14 F.Supp.2d 1135 (D.S.D.1998). The defendants appealed, and we affirmed in part, reversed in part, and remanded for further proceedings, *Gaffey II,* 188 F.3d at 1030-31, holding that the reservation had been diminished rather than disestablished and that it included at least the agency trust lands, but reversing and remanding in other respects.

Now before our court are appeals filed by both sides from the judgment issued by the district court after additional proceedings on remand, *Yankton Sioux Tribe v. Podhradsky,* 529 F.Supp.2d 1040

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district representatives were present during the Podhradsky trial but had not played an active role after October 2004.

(D.S.D.2007). The district court ruled that some 37,600 acres of trust land remained part of the reservation and that land continuously owned in fee by individual Indians also qualified as reservation. The county and state defendants appeal, and the Tribe, supported by the intervening United States, cross appeals. We affirm in part and vacate in part.

I.

The original boundaries of the Yankton Sioux Reservation were created by treaty between the Tribe and the United States on April 19, 1858, 11 Stat. 743 (1858 Treaty). In that treaty, the Tribe ceded more than 11,000,000 acres of land to the United States and reserved to itself approximately 430,400[4] acres in what is now Charles Mix County, South Dakota. The United States guaranteed to the Tribe "the quiet and peaceable possession of the said tract," 11 Stat. at 744, and agreed that, with certain exceptions, "[n]o white person . . . shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians," 11 Stat. at 747. The subsequent history of the Tribe and its reservation reflects

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[4] Although the 1858 Treaty refers to 400,000 acres, a later survey concluded the reservation contained 430,405 acres at the time of the treaty *See* Letter from the Commissioner of Indian Affairs to the Secretary of the Interior (Dec 9, 1893), *reprinted in* S. Exec. Doc No. 27, 53d Cong., 2d Sess , 1, 5 (1894) (Commissioner's Letter).

the changing policies of the federal government over the succeeding years.

In the first half of the nineteenth century, federal Indian policy focused on removing tribes from the eastern half of the country and relocating them on western lands, but by the time of the 1858 Treaty, "federal policy had shifted fully from removal to concentration on fixed reservations." *Cohen's Handbook of Federal Indian Law* § 1.03[6][a], at 65 (2005 ed.) (*Cohen*). These reservations were "envisioned as schools for civilization, in which Indians under the control of the agent would be groomed for assimilation." *Id.*

As the westward migration of white settlers accelerated following the Civil War, pressure grew to open Indian reservations for agricultural and resource development by the newcomers. Supporters of Indian assimilation argued that as more Indians adopted white customs and agricultural practices, their need for large tracts of reservation land would diminish, freeing vast areas for white settlement and development. This approach was formalized in the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (repealed in part by Pub.L. No. 106-462 § 106, 114 Stat.1991, 2007 (2000)).

Under the Dawes Act, the executive branch was authorized to divide portions of Indian reservations into personally assigned allotments to be distributed to individual tribal members. *Id.* § 1, 24 Stat. at 388. The Secretary of the Interior was directed to issue

patents, under which the United States would hold title to the allotments in trust for twenty five years "for the sole use and benefit of the Indian to whom such allotment shall have been made." *Id.* § 5, 24 Stat. at 389. At the end of the trust period, allottees would take fee simple ownership of their individual plots, free of any restrictions against sale or alienation to non Indians. *Id.* Furthermore, once a reservation had been divided into allotments, the government was empowered to negotiate with the tribes for the purchase of unallotted surplus land and to open such areas to white settlement. *Id.*

The allotment policy in general and the Dawes Act in particular were intended to hasten the demise of the reservation system and to encourage Indian assimilation into the white system of private property ownership. "Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers." *Yankton Sioux Tribe,* 522 U.S. at 335, 118 S.Ct. 789.

Acting under the authority of the Dawes Act, federal agents allocated to tribal members individual allotments comprising 167,325 acres of the then 430,405 acre Yankton Sioux Reservation. Another 95,000 acres were subsequently allotted to tribal members under the Act of February 28, 1891, 26 Stat. 794 (1891 Act). These tribal allotments, totaling approximately 262,300 acres, were not contiguous parcels of land. Rather, the individual allotments were scattered across the reservation and interspersed

with approximately 168,000 acres of unallotted surplus land. Commissioner's Letter at 5.

In 1892 a three member Yankton Indian Commission, which represented the Secretary of the Interior, traveled to the reservation to discuss the federal government's interest in acquiring the Tribe's surplus land. After lengthy negotiations, the Tribe agreed to sell all of the unallotted acreage to the United States for $600,000. The ceded land was then to be opened to white settlement, with the exception of roughly 1,000 acres specifically reserved for use by the United States for "agency, schools, and other purposes." Act of August 15, 1894, ch. 290, 28 Stat. 286, 316 (1894 Act). These set aside agency reserve lands were expected to be opened for white ownership at such time as they were no longer needed for the Tribe's support. *Id.* The Supreme Court has commented that the set aside of these agency lands is evidence that Congress envisioned an ongoing reservation despite the sale of the surplus lands. *Yankton Sioux Tribe,* 522 U.S. at 350, 118 S.Ct. 789.

Congress ratified the cession agreement by statute in the 1894 Act, and in May 1895 President Grover Cleveland issued a proclamation opening the ceded land to white settlement. In *Yankton Sioux Tribe* the Supreme Court ruled that the land ceded to the United States under the 1894 Act was thus no longer part of the Yankton Sioux Reservation but fully subject to the jurisdiction of South Dakota. 522 U.S. at 358, 118 S.Ct. 354. By the end of the nineteenth century federal Indian policy had therefore

reduced the Tribe's land holdings from a sizeable communal reservation to a checkerboard of individual allotments intermingled with white homesteads.

Subsequently Congress passed the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (Burke Act), amending § 6 of the Dawes Act. The Burke Act gave the Secretary of the Interior the discretion to remove allotted land from trust status and to issue fee simple patents, either upon the death of an Indian allottee or upon a finding that an allottee was "competent and capable of managing his or her affairs." 34 Stat. at 183. Upon issuance of fee simple patents, such Indian owned land would then be freely alienable to white settlers. As a result of fee patents issued under the Burke Act, tribal allotments began passing into white hands well before the expiration of the original twenty five year trust period set by the Dawes Act. By 1930, tribal members held only 43,358 acres of land out of the more than 262,300 acres originally carved into Indian allotments.[5] Herbert T. Hoover, A Yankton

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[5] The Tribe argues that the Burke Act did not apply to allotments made on the Yankton Sioux Reservation and that therefore some 300 "forced fee patents" issued under it should be considered null and void. The Tribe did not raise this argument until after the case was before the district court for the third time. As that court noted, "[t]here is . . . a limit as to what should be undertaken . . . to determine reservation boundary issues that were not raised or addressed by this Court nor the superior courts. This issue . . . [is] beyond the scope of this litigation. . . ." *Yankton Sioux Tribe v. Gaffey*, No. CIV 98-4042, 2006 WL 3703274, at *3 (D.S.D. Dec. 13, 2006) (order identifying the issues to be considered on remand). We agree.

Sioux Tribal Land History 5 (1995) (unpublished manuscript).

In 1916, recognizing the rapid erosion of the Tribe's allotted lands, President Woodrow Wilson issued an executive order extending by ten years the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust periods were again extended in 1926 and 1929. Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929. In 1929 Congress also reconsidered the disposition of the roughly 1,000 acres of land which had been set aside for "agency, schools, or other purposes." Although the 1894 Act originally envisioned that these lands would be opened to white settlement once they had served their intended purposes, Congress decided instead to return them to the Tribe and specifically precluded any allotments on these parcels. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act).

During this period, the consequences of the allotment and assimilation policies became acutely obvious. The process of allotment and the liberalized issuance of fee patents under the Burke Act left many Indians landless and reduced once coherent communities to jurisdictional checkerboards, as is currently reflected in respect to the Yankton Sioux Reservation. *Cohen*, § 1.04, at 78. Moreover, "[t]he process of transforming Indian culture into white culture proved more difficult than placing an Indian name on allotted land deeds. . . . [T]he cultural resilience of the

American Indian amazed even the most dedicated reformer." *Id.* at 80.

By the early twentieth century, the forces behind allotment and assimilation were nearly exhausted, and federal policy was reoriented towards "new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems." *Id.* § 1.05, at 84. In time this new attitude led to the Indian Reorganization Act of 1934(IRA), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*).

The IRA reflected a fundamental change in federal Indian policy. It prohibited further allotment of Indian lands and indefinitely extended the trust periods for outstanding allotments. The Act also authorized the Secretary of the Interior to acquire additional lands in trust – both on and off reservation – and either to proclaim these lands part of a new reservation or to add them to an existing one. Since the passage of the IRA, the government has taken almost 6,500 acres into trust for the benefit of the Yankton Sioux Tribe.

This tangled history, along with the inconsistent and sometimes contradictory policies pursued by the national government, has produced a confusing patchwork of land holdings and jurisdictional claims within the original 1858 boundaries of the reservation. For

ease of exposition, we have identified six general categories of land.

> (1) *Allotted Trust Lands:* lands allotted to members of the Tribe which have been continuously held in trust for the benefit of the Tribe or its members. This category includes allotments which were later transferred from individual to tribal control, so long as the trust status was maintained. The district court found 30,051.66 acres of land fit this description.[6]
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> (2) *Agency Trust Lands:* lands ceded to the United States in the 1894 Act but reserved for "agency, schools, and other purposes" which then were returned to the Tribe according to the 1929 Act. The district court identified 913.83 acres of land within this category. We held this category of land to be part of the diminished Yankton Sioux Reservation in *Gaffey II*, 188 F.3d at 1030.
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> (3) *IRA Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe pursuant to the IRA. The district court identified 6,444.47 acres of such land.
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> (4) *Miscellaneous Trust Lands:* lands acquired by the United States in trust for the benefit of the Tribe other than pursuant to

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[6] In *Yankton Sioux Tribe* the Supreme Court mentioned 30,000 acres held in trust for individual Indians and 6,000 acres of "tribal lands." 118 S Ct. at 796.

> the IRA. Approximately 174.57 acres fit within this category.
>
> (5) *Indian Fee Lands:* allotted lands later transferred in fee to individual Indians and which have never passed out of Indian ownership. The record does not identify lands which may fit this description.
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> (6) *Non Indian Fee Lands:* lands ceded to the United States in the 1894 Act and subsequently opened to white settlement which have not been reacquired in trust; and nonceded lands originally allotted to tribal members but later transferred in fee to non Indians and never reacquired in trust.

Of these six categories, the first four may be generically referred to as "trust lands" and the last two as "fee lands."

The trust lands are spread across the site of the original 1858 reservation in a complex checkerboard pattern, intermingled with lands long since occupied by white homesteaders. As a result the Yankton Sioux trust lands are not neatly contained within a single continuous boundary. The defendants urge that this characteristic shows the reservation has ceased to exist, but they cite no authority which requires that a reservation consist of compact, contiguous lands. While the fractured configuration of the Yankton Sioux Reservation may not seem ideal to various parties, it is a historic artifact resulting from shifting federal policy. There was evidence at trial that the parties have long experience in dealing with this

historical reality. For example, defendant Scott Podhradsky, state's attorney for Charles Mix County, testified that local and federal officials have developed a respectful and productive working relationship despite the complex jurisdictional boundaries.

In short, the 11,000,000 acre domain once assigned to the Tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894. The issues now before us include the status of some 37,600 acres held in trust. Whatever the size of the remaining reservation lands, there is evidence in the record that they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.

II.

In September 1994 the Yankton Sioux Tribe commenced its civil action against the Waste District seeking to prove that the site of a proposed landfill was in fact located on the Yankton Sioux Reservation and was therefore subject to federal environmental regulations. The Waste District filed a third party complaint and added the State of South Dakota as a party. In 1995 the district court decided that the original reservation boundaries as established by the 1858 Treaty remained in force. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996).

The Supreme Court reversed, holding that all lands which had been ceded to the United States pursuant to the 1894 Act had thereby lost reservation status and were returned to the public domain. The Court specifically reserved the question of whether the 1894 Act had disestablished the entire reservation or whether a diminished reservation continued to exist within the nonceded lands. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). It also observed that the Act's special treatment of the reserved agency trust lands was an indication that Congress intended some sort of continuing reservation. *Id.* at 350, 118 S.Ct. 789. The case was then returned to our court, and we remanded to the district court for further proceedings. *Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist.,* 141 F.3d 798, 799 (1998).

On remand the district court consolidated the original case against the Waste District with this separate civil action brought by the Tribe against various state and county officials seeking injunctive and declaratory relief. The Tribe asserted that the Yankton Sioux Reservation had been diminished only by those lands ceded in the 1894 Act and that all other lands within the 1858 boundaries – that is, the 262,300 acres comprising the original allotted trust lands – remained part of the reservation regardless of their later disposition. The Tribe argued that such lands were therefore within the jurisdiction of the Tribe and the federal government. The United States successfully intervened on behalf of the Tribe. After

considering the parties' arguments, the district court held in favor of the Tribe and the government and declared that the Yankton Sioux Reservation continued to exist and consisted of the agency trust lands in addition to all other lands which had not been ceded in the 1894 Act. *Yankton Sioux Tribe v. Gaffey (Gaffey I),* 14 F.Supp.2d 1135 (D.S.D.1998).

The defendants appealed, and this court affirmed in part, reversed in part, and remanded. *Yankton Sioux Tribe v. Gaffey (Gaffey II),* 188 F.3d 1010 (8th Cir.1999), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). After examining the arguments of the parties and the record they had made, we held that the Yankton Sioux Reservation had not been disestablished by the cession of surplus lands or by other means. We also held that the reservation consisted of, at a bare minimum, those lands reserved by the 1894 Act to the United States for "agency, schools, and other purposes" and which had been subsequently returned to the Tribe by the 1929 Act. We reversed the judgment of the district court that all of the originally allotted lands continued to be part of the reservation. We concluded that those allotments which had passed out of Indian hands and into white ownership had ceased to be part of the reservation. Since the existing record was inadequate to determine the status of either the remaining trust lands or any fee lands owned by individual Indians, a remand was necessary. The remaining trust lands were comprised of allotments continuously held in trust for the Tribe or its members, as well as lands later taken

into trust by the United States for the benefit of the Tribe including those acquired pursuant to the 1934 Indian Reorganization Act.

In sum, in *Gaffey II* we held that the Yankton Sioux Reservation had not been disestablished but diminished, and that it consisted of at least the agency trust lands but did not include lands which had passed into white ownership. We remanded to the district court with instructions to develop the record and make findings relevant to the status of the remaining categories of land. All parties petitioned for en banc review, which was denied. *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. Dec. 8, 1999) (order denying petition for rehearing with petition for rehearing en banc). The Supreme Court denied certiorari. *Yankton Sioux Tribe v. Gaffey,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000).

On remand the parties conducted additional discovery, after which the district court conducted a two day trial and considered a voluminous set of historical documents and government reports, along with numerous spreadsheets and area maps relevant to the various land holdings in dispute. The district court then made findings of fact and conclusions of law, settling all the contested issues about reservation status in favor of the Tribe. The district court began by recognizing our *Gaffey II* holding, including that the agency trust lands which had been returned to the Tribe were part of a diminished Yankton Sioux Reservation. The district court then determined that all outstanding allotments which had maintained

their trust status – whether for the benefit of the Tribe in common or for individual members – continued to be part of the reservation. Next, the district court held that all lands taken into trust pursuant to the IRA were reservation land; the district court determined alternatively that this category of trust lands is at a minimum "de facto" reservation or a "dependent Indian community" subject to federal and tribal jurisdiction. Finally, the district court ruled that former allotments which were now owned in fee by tribal members were part of the reservation so long as such lands had never passed out of Indian ownership.

The district court also made several ancillary rulings. In particular, it held that, notwithstanding the Tribe's contrary assertion, a 1927 congressional enactment had not frozen the boundaries of the reservation. It further held that the 1934 IRA had frozen the boundaries, but that a subsequent 1948 measure ended that freeze. The district court also rejected a claim by the defendants that 3,201 acres of land allegedly taken into trust by the United States for the benefit of the Tribe were never formally accepted into trust status and therefore cannot be considered trust lands or reservation. The district court held that such a challenge to the trust status of the lands was barred by the United States' sovereign immunity and that such immunity had not been waived by the Quiet Title Act, 28 U.S.C. § 2409a.

The district court's final judgment decreed that the agency trust lands, outstanding allotments, IRA trust lands, and Indian owned fee lands continuously held in Indian hands qualified as reservation. It denied all other claims asserted by the parties. The final judgment did not incorporate the district court's alternative holdings, and it is from that judgment that appellants and cross appellants have taken their appeals.

On their appeal, the defendants challenge the district court's conclusions that the various trust lands are part of the Yankton Sioux Reservation, either formally or informally, or that such lands support a dependent Indian community. They also persist in asking us to reconsider *Gaffey II* and continue to argue, contrary to that decision, that the reservation has been completely disestablished and that even the agency trust lands lack reservation status. Finally, they contend that the district court erred in not considering their claim that the United States had failed formally to accept certain lands into trust. On its cross appeal, the Tribe objects to the district court ruling that the reservation boundaries are not frozen. The United States asks us to affirm the district court decision in its entirety. We review the findings of fact made by the district court in a bench trial for clear error and review de novo its legal conclusions and mixed questions of law and fact. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 804 (8th Cir.2008).

III.

Before we turn to review of the district court's findings and conclusions on remand, we must take up several preliminary issues raised there and argued again on appeal. First among these is the defendants' continuing challenge to our holding in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished.

Gaffey II squarely held that the Yankton Sioux Reservation was never disestablished and that, although diminished, the reservation continues to exist and at a minimum consists of the agency trust lands reserved to the United States for "agency, schools, and other purposes" and later returned to the Tribe. These holdings were part of the law of the case remanded to the district court. The law of the case doctrine means "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir.2008) (internal quotation marks omitted). The appellants have presented no persuasive reasons to revisit our holding in *Gaffey II*.

We observed in *Gaffey II* that the 1894 Act reserved the agency trust lands to the federal government for the purpose of providing "aid and education to tribal members so long as they were needed." *Gaffey II*, 188 F.3d at 1029. That provision is "strong evidence that a reservation was expected to remain in existence." *Id.* at 1027. Indeed, the Supreme Court

appeared to reach a similar conclusion in *Yankton Sioux Tribe*, commenting that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)). Based on the language of the 1894 Act and the negotiations between the Tribe and federal officials preceding it, we held in *Gaffey II* that these lands were part of an ongoing reservation. 188 F.3d at 1030.

Under the law of the case doctrine, "a decision in a prior appeal is followed in later proceedings unless a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." *United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir.1995) (internal quotation marks omitted). The defendants have not met either of these conditions.

The defendants' new evidence introduced at the court trial on remand does not undermine our analysis in *Gaffey II*. They rely principally on testimony by a former official of the Bureau of Indian Affairs and an agent of the Federal Bureau of Investigation, both of whom said that they personally would exercise jurisdiction over agency trust land only so long as it was held in trust. Because these witnesses based their jurisdiction on the land's trust status as opposed to any reservation status, the defendants argue their testimony undermines the concept of a continuing

reservation. According to the trial transcript, these witnesses were never asked whether the agency trust land also qualifies as reservation land, and it is far from clear that their statements reflect a considered jurisdictional distinction between reservation land and various trust properties. More importantly, their testimony sheds little light on the intentions of either the nineteenth century parties who negotiated the agreement between the Tribe and the federal government or of the Secretary of the Interior in making decisions to add trust land to an existing reservation. The defendants also point to evidence that the agency trust lands are located on two distinct parcels and are not contiguous, which is not surprising given the checkerboard nature of the allotments.

It is not clear that any of the defendants' evidence was truly "new" in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation. As another court pointed out in rejecting an attempt to challenge the law of the case with newly presented evidence, "[t]here is nothing in the record to indicate that the evidence produced at the hearing after remand was unavailable to the [litigants] during the first trial. [They] simply chose not to produce that evidence. They chose their trial strategy, litigated accordingly, and lost." *Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir.1982).

Most significantly, the rulings in *Gaffey II* have not been shown to be erroneous. They were based on an exhaustive analysis of the historical materials

surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history. *Gaffey II*, 188 F.3d at 1021-28.[7] As already pointed out, the Supreme Court has indicated that the agency trust land provision of the 1894 Act suggests Congress envisioned an ongoing reservation. *Yankton Sioux Tribe*, 522 U.S. at 350, 118 S.Ct. 789. Clearly the defendants disagree with much of *Gaffey II*, "but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L.Ed. 969 (1857). The law of the case as determined in *Gaffey II* continues to control this matter, and the district court did not err by following our mandate that the reservation still exists even though diminished and that it includes the agency trust lands.

The defendants also argue that two parcels of the agency trust land, totaling 106 acres, were not within

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[7] The defendants rely on *Bruguier v. Class*, 599 N.W.2d 364 (S.D.1999), a South Dakota Supreme Court decision released one day after *Gaffey II*. *Bruguier* was a habeas case dealing with the criminal jurisdiction status of a former allotment which had passed into white ownership (a category of land which *Gaffey II* held was not part of a diminished reservation). *Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue, and none of the parties to this litigation participated in that case.

the scope of the 1929 Act which returned the balance of the agency trust lands to the Tribe. These two parcels were conveyed by fee patents to the Chapter of Calvary Cathedral Episcopal Church in 1897 and in 1920. They were thus owned by that church when Congress directed in 1929 that the agency trust lands be returned to the Tribe, rather than be opened for white settlement once they were no longer needed for their intended purposes. The defendants argue that because these 106 acres were in private hands at the time of the 1929 Act, they were not within the Act's purview and are thus outside of *Gaffey II*'s holding that agency trust land "reserved to the federal government . . . and then returned to the Tribe continues to be a reservation." 188 F.3d at 1030. Whether the 1929 Act would have applied to these lands is moot, for in 1944 and 1945 the church returned these lands to the United States to be held in trust for the Yankton Sioux Tribe. They thus comfortably fit within the holding of *Gaffey II* and are reservation land under the controlling law of this case.

IV.

We now turn to the jurisdictional questions at the heart of this case. Reservation land is by definition "Indian country," and as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 140 L.Ed.2d 30

(1998). Reservation status is not the only way to qualify as Indian country. Today the definition of Indian country is found in by [sic] 18 U.S.C. § 1151 which was enacted in 1948 and reads in pertinent part as follows:[8]

> [T]he term "Indian country" . . . means **(a)** all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, **(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and **(c)** all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Prior to the enactment of § 1151, the evolving concept of Indian country had mainly been developed and refined by the courts in their attempts to stay abreast of changing conditions in the American West and in federal Indian policy. *See Cohen*, § 3.04[2][b], at 184-88.

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[8] Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well *See Venetie*, 522 U.S. at 527, 118 S Ct. 948

Congress reentered the debate in 1948 by adopting § 1151, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757, but the statute mainly codified earlier Supreme Court decisions regarding Indian country. The language in § 1151(b) is taken almost verbatim from the Court's conclusion in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), that the federal government has a "duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *Id.* at 46. Likewise, § 1151(c) affirms the Court's holdings in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and *United States v. Ramsey*, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), that allotments constitute Indian country and fall within the jurisdiction of the federal government and the resident tribes.

Section 1151(a) confirms that reservations are properly considered Indian country and are therefore under the primary jurisdiction of the federal government and the relevant tribes. In this sense it is in accord with such cases as *Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877), and *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). However, the enactment of § 1151(a) added an important twist to the nature of reservation land. According to its terms, reservation land remains Indian country "notwithstanding the issuance of any patent."

Section 1151(a) thus explicitly separates the concept of jurisdiction from the concept of ownership, and in so doing Congress superceded prior case law. For example, *Clairmont v. United States*, 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed. 1201 (1912), had held that land "was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country. . . ." *Id.* at 558, 32 S.Ct. 787 (quoting *Bates*, 95 U.S. at 208). Section 1151(a) abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (concluding that under § 1151(a) reservation status applies even when land is purchased by a non Indian); *see also Solem*, 465 U.S. at 468, 104 S.Ct. 1161 ("Only in 1948 did Congress uncouple reservation status from Indian ownership. . . .").

A.

Having ruled in *Gaffey II* that the Yankton Sioux Reservation had not been disestablished, we remanded for the district court to consider, among other matters, the status of allotted trust lands which had retained their trust status. All sides to this litigation acknowledge, as they must, that such lands qualify at the very least as Indian country under § 1151(c),

which explicitly identifies allotments as such. The disputed issue is whether these allotments are also part of the Yankton Sioux Reservation and therefore also qualify as Indian country under § 1151(a).

The distinction is important since lands which qualify only under § 1151(c) would lose their Indian country status if their governing trusts were ever terminated or revoked. If these lands also qualify as reservation, however, their Indian country status would be considerably more durable. Under § 1151(a) reservation lands retain their status "notwithstanding the issuance of any patent," including a patent which terminated a trust and conveyed the land in fee simple. After considering the evidence at trial, the district court held that the allotments were indeed part of an ongoing reservation and qualified as Indian country under § 1151(a).

The Supreme Court held in *Solem* that "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161. Furthermore, as we noted in *Gaffey II*, congressional "[i]ntent to diminish or disestablish a reservation must be 'clear and plain.'" 188 F.3d at 1021 (quoting *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986)). While the 1894 Act clearly expressed Congress's intention to sever the ceded surplus lands from the reservation, *Yankton Sioux Tribe*, 522 U.S. at 357-58, 118 S.Ct. 789, Congress never expressed a similar intention with respect to the allotted lands. The

simple act of dividing the Yankton Sioux Reservation into individual allotments was insufficient to divest the allotted lands of their reservation status.

Prior to the expiration of the trust period, the allotted lands "remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control." *Pelican,* 232 U.S. at 449, 34 S.Ct. 396; *see also Mattz v. Arnett,* 412 U.S. 481, 496, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (holding that the policy of the Dawes Act "was to continue the reservation system and the trust status of Indian lands"); *United States v. Celestine,* 215 U.S. 278, 287, 30 S.Ct. 93, 54 L.Ed. 195 (1909) ("It is clear that the allotment alone could not [revoke the reservation].") (quoting *Eells v. Ross,* 64 F. 417, 419-20 (9th Cir.1894)). Furthermore, the Tribe's willingness to cede to the United States its *unallotted* lands does not indicate that the reservation status of *allotted* lands was also revoked. *Yankton Sioux Tribe,* 522 U.S. at 356, 118 S.Ct. 789 ("[W]e have repeatedly stated that not every surplus land Act diminished the affected reservation."). More importantly, there is no indication in the historical record that either Congress or the Tribe expressly intended to eliminate the reservation status of the Yankton allotted lands immediately upon allotment or upon the sale of the Tribe's surplus holdings.

It is clear from the circumstances surrounding the Tribe's agreement to sell its surplus lands that

the Tribe did not intend to relinquish immediate jurisdiction over the allotments and that it would not be required to part with them. In the discussions leading up to the agreement, a government negotiator explained to tribal members that

> [the Great White Father] wants to give you a chance to sell your surplus lands. . . . *He has told us to tell you that you will not be forced to part with your lands unless you want to. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever.*

Council of the Yankton Indians (Oct. 8, 1892), *transcribed in* S. Exec. Doc. 27, 53d Cong., 2d Sess., 47, 49 (1894) (emphasis added). These reassurances acquire particular significance in light of the longstanding rule that an agreement between the United States and an Indian tribe should be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (quoting *Jones v. Meehan,* 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899)).

In their report on the outcome of their negotiations with the Tribe, the federal commissioners wrote that "the purchase of the surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the

Indians being of greater importance. . . ." Report of the Yankton Indian Commission (Mar. 31,1893), *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 7, 17 (1894). In particular, the Tribe was anxious to insure that annuity payments from the federal government would continue uninterrupted. The historical evidence thus reveals that the Tribe, while willing to sell its surplus, was concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands.

The final agreement, as ratified in the 1894 Act, reflects this understanding. As already noted, the Act set aside the agency trust land specifically to support the Tribe, a provision which the Supreme Court found "counsels against finding the reservation terminated." *Yankton Sioux Tribe,* 522 U.S. at 350, 118 S.Ct. 789. Furthermore, the statute ratifying the parties' agreement guaranteed to the Indian allottees the "undisturbed and peaceable possession of their allotted lands" as well as "all the rights and privileges of the tribe." 1894 Act, 28 Stat. at 317.

Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement. In the absence of such an intention, we must conclude that at the time of the Act those lands retained the same reservation status they had enjoyed since the original 1858 Treaty. Even if Congress

had foreseen an eventual end to the reservation, one which would perhaps be hastened by the allotment policy,[9] such an expectation would not have been at odds to the nineteenth century mind with the ongoing maintenance of a reservation on the allotted lands. The fact that tribal members maintained beneficial property interests in the allotments is further evidence that the reservation status of those lands was preserved since at the time Indian land ownership was synonymous with reservation status. *See, e.g., Solem,* 465 U.S. at 468, 104 S.Ct. 1161 ("The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.").

In the course of setting out the twists and turns in the federal policy regarding tribal lands, *Gaffey II* recounted Congress's original expectation that allotments would lose their reservation status as they passed out of Indian ownership and into white hands. 188 F.3d at 1028. That original concept was not inconsistent with the maintenance of reservation status for the allotted lands so long as they are held in trust. The defendants claim that because allotments lost their Indian country status when they

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[9] It is worth noting that the eventual expiration of the allotments was never a foregone conclusion. The Dawes Act allowed the president to extend the allotment period, which Presidents Wilson, Coolidge, and Hoover each did. The allotments were then indefinitely extended under the 1934 Indian Reorganization Act.

passed out of Indian hands, they cannot be reservation under § 1151(a) since under that subsection the Indian country status of reservation land is unaffected by ownership. The flaw in the defendants' argument is its attempt to interpret congressional and tribal intentions around 1892 through the modern lens of § 1151. As previously discussed, the 1948 enactment of § 1151(a) introduced a new understanding of Indian country which for the first time separated Indian ownership from reservation status. *See Solem,* 465 U.S. at 468, 104 S.Ct. 1161. As we noted in *Gaffey II,* this concept "would have . . . been quite foreign" to the parties who negotiated the 1892 agreement between the Tribe and the government, and it is their intentions and not the current statutory regime that "we must look to here." 188 F.3d at 1022.

To summarize, the 1892 agreement, and the 1894 Act which ratified it, expressed no clear congressional intent to divest allotted lands of their reservation status, and in the absence of such intent their reservation status was preserved. During that period, however – and continuing until the 1948 passage of § 1151 – prevailing law linked reservation status with Indian ownership. On this basis, we held in *Gaffey II* that allotments which passed into white hands lost their reservation status. Section 1151 altered the old understanding and gave a previously unimagined durability to reservation land by separating jurisdiction from ownership. Thus, while prior to 1948 an allotment on reservation land would have ceased to

be Indian country upon its sale to white owners, that is no longer the case today.[10]

The alleged inconsistency between our holding in *Gaffey II* (allotments lost reservation status upon sale to whites) and the district court's determination that allotments are reservation under § 1151(a) (reservation status is unaffected by sale) is nothing of the sort. It merely reflects the evolution of federal Indian policy and the defendants' anachronistic attempt to force a nineteenth century agreement into the mold of current legal principles.[11] The district court did not err when it concluded that all outstanding allotted lands continue to be reservation and qualify as Indian country under § 1151(a).

B.

On remand the district court was also asked to consider the status of lands taken into trust by the

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[10] It is unclear from the record whether any allotments have been patented in fee since 1948 and subsequently sold to white owners. If such lands exist, however, they would continue to be Indian country under the clear terms of § 1151(a). The holding in *Gaffey II* that lands which passed into white ownership lost reservation status thus only applies to pre 1948 conveyances.

[11] As already discussed, the origins of the checkerboard pattern of the Yankton Sioux Reservation lie in the federal government's former allotment policies and its liberal issuance of fee patents under the Burke Act.

federal government pursuant to the Indian Reorganization Act. The district court concluded that when lands which were once part of the original 1858 reservation were taken into trust under the IRA, they reacquired reservation status. It identified 6,444.47 acres of such land and classified them as Indian country under § 1151(a). The defendants appeal this holding while the Tribe and the United States support it.[12]

Congress passed the IRA in 1934, authorizing the Secretary of the Interior "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." IRA § 5, 25 U.S.C. § 465. The purpose of the Act was to further the independence of tribes and strengthen their ability to govern themselves. *See Cohen,* § 1.05, at 86 (The IRA was meant "to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism."). Its provisions are

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[12] The defendants also claim that the United States failed formally to approve some 29 deeds conveying land in trust These deeds affect approximately half of the IRA trust lands The defendants argue that since the deeds were recorded without a formal acceptance by the government, the lands conveyed by them are not validly held in trust and cannot qualify as Indian country under any portion of § 1151. As the district court observed, "this case involves jurisdiction issues and does not affect title to real estate." *Podhradsky,* 529 F Supp.2d at 1043. It pointed out that the federal government's sovereign immunity was not waived by the Quiet Title Act, 28 U S.C. § 2409a (specifically exempting "trust or restricted Indian lands" from a more general waiver of immunity)

meant "to stabilize the tribal land base," *Nichols v. Rysavy*, 809 F.2d 1317, 1323 (8th Cir.1987), and to that end the legislation was "designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains*." *Cohen*, § 1.05, at 86 (emphasis added).

The defendants argue that taking land into trust for the benefit of an Indian tribe is insufficient to convert such land into Indian country, but their position runs contrary to well settled precedent. As the Supreme Court has recognized, "[s]ection 465 provides the proper avenue for [a tribe] to reestablish sovereign authority over territory. . . ." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005). This court has also acknowledged that land held in trust under § 465 is effectively removed from state jurisdiction. In *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.1978), we noted that when Congress enacted § 465 "it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation." *Id.* at 1018.[13] *See also*

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[13] The defendants point to dictum in *United States v. Stands*, 105 F.3d 1565 (8th Cir.1997), that "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. The issue in *Stands* was whether a particular parcel of land was or was not an allotment; the parties made no argument regarding the Indian country status of trust lands since that issue was irrelevant *Id.* at 1572 n. 3. Even so,

(Continued on following page)

United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir.1999) ("[L]ands owned by the federal government in trust for Indian tribes [under § 465] are Indian country pursuant to 18 U.S.C. § 1151."); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir.1985) ("[W]hether the lands [acquired pursuant to § 465] are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country.").

The Tribe and the United States assert that when former reservation land is reacquired in trust under the IRA it is not just Indian country, but a particular *type* of Indian country, namely reservation within the meaning of § 1151(a). The difference is important because Indian country under § 1151(a) has the distinct property of retaining its status "notwithstanding the issuance of any patent." In other words, such land remains part of the reservation even if sold. The defendants argue, however, that the Yankton IRA trust lands do not qualify as reservation under § 1151(a) because the Secretary of the Interior has not issued a formal proclamation to that effect. They rely on § 7 of the IRA, 25 U.S.C. § 467, which provides that the Secretary "is . . . authorized to proclaim new Indian reservations on lands acquired . . . or to add such lands to existing reservations" (emphasis added).

Stands acknowledged that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." *Id.*

While there is no doubt that § 467 requires a proclamation when the Secretary wishes to establish a new reservation, the statute does not state that a proclamation is required when the Secretary decides to add land to a preexisting reservation such as that of the Yankton Sioux. Congress left the decision to the Secretary, authorizing the Secretary "to proclaim new Indian reservations . . . *or* to add such lands to existing reservations." *Id.* (emphasis added). The statutory language does not itself require a proclamation in the case of preexisting reservations, and the "cardinal canon" of statutory interpretation is "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). By taking former Yankton Sioux Reservation lands back into trust under the IRA, the Secretary effectively exercised his authority to consolidate the Tribe's land base by restoring reservation status to former pieces of a reservation in existence since 1858.

When § 467 was drafted in 1934, the concept of Indian country lacked the benefit of § 1151's precise definition. Fine distinctions between reservation land, trust land, allotted land, dependent Indian communities, and the like would have carried little practical weight since jurisdiction was at the time essentially synonymous with Indian ownership. It would therefore have made sense for the congressional drafters of § 467 to provide for the Secretary to distinguish by means of a proclamation between

acquisitions of land intended to create a new reservation and acquisitions of land simply to be held in trust. Land held in trust by the federal government for addition to an existing Indian reservation would have been perceived as under federal jurisdiction even without a proclamation.

The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and *repurchase of former tribal domains*." *Cohen*, § 1.05, at 86 (emphasis added). Indeed, a principle motivation for the IRA was to "permit progress toward the consolidation of badly checkerboarded Indian reservations." 78 Cong. Rec. 11,730 (1934) (statement of Rep. Howard). In keeping with that legislative intent, the Secretary made the decision to reacquire land in trust which had been formerly recognized as part of an existing reservation, the Yankton Sioux Reservation. This is entirely different from acquisition of land never previously recognized as under Indian jurisdiction. When the Secretary proclaims an intent to reincorporate trust land as a new reservation, it serves to give notice to all of a significant change in condition.

The parties most directly affected by a trust acquisition – the United States as trustee and the Tribe as beneficiary – both agree that the Secretary's decision to take former Yankton Sioux Reservation land into trust was sufficient to restore that land to its previous reservation status. The Secretary has

preeminence in interpreting laws under the Department's jurisdiction, *Tang v. INS*, 223 F.3d 713, 719 (8th Cir.2000) (according "substantial deference to the agency's interpretation of the statutes and regulations it administers"), and has never seen it necessary to issue a proclamation in respect to the Yankton IRA trust lands despite this extended litigation. The interests of the defendants are protected by administrative procedures in the Department of the Interior in which trust acquisitions are balanced against a multitude of factors, including "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. § 151.10(f).

The regulations reflect that the acquisition of former reservation land is likely to pose fewer problems than an acquisition of land which has no historical connection to a tribe's land base. Current regulations treat trust acquisitions of former reservation lands as an "on reservation" rather than an "off reservation" transactions, *see* 25 C.F.R. § 151.2(f) (defining reservation to include "that area of land constituting the former reservation"), and subject them to less searching scrutiny. For example, if a tribe requests an off reservation acquisition – that is, one involving land which is not nor ever has been part of a reservation – the regulations require the Secretary to consider "[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation." 25 C.F.R. § 151.11(b). If off reservation land is being acquired for business purposes, "the tribe shall provide a plan

which specifies the anticipated economic benefits." *Id.* § 151.11(c). Such regulations are consistent with our own analysis that restoration through the IRA of territory historically part of the Yankton Sioux Reservation is distinguishable from the acquisition of lands never within Indian domain and may be accomplished without a proclamation.

Moreover, the defendants can cite no statutory language or case law making an official proclamation necessary before former reservation lands can reacquire their reservation status. The only case they point to involved the establishment of a new reservation, not the return of former reservation land to an existing one, and is thus inapposite. *See Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C.Cir.2007).

The defendants also argue that treating trust acquisitions of former reservation land differently from other acquisitions would grant significance to the 1858 boundaries despite the Supreme Court's determination in *Yankton Sioux Tribe*, and our own conclusion in *Gaffey II*, that the original boundaries have been altered by the reservation's diminishment. While it is true that the original 1858 boundaries are no longer markers dividing jurisdiction between the Tribe and the state, that does not mean to say they have lost their historical relevance for the Secretary's discretionary acts. Defendants argue that the IRA's legislative history, the Department of the Interior's internal guidelines, and the *Cohen* handbook stand for the proposition that some official action beyond

the acquisition of land is necessary when adding trust land to an existing reservation.

Here, the lands under consideration were part of this tribe's 1858 reservation and have been reacquired in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. We believe this presents a distinct question, one which the sources cited by the defendants simply do not resolve. There is a fundamental difference between acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base. While Congress has provided that an official proclamation by the Secretary is necessary for adding such unrelated land to a reservation, it has not required it for the latter. The district court did not err in its conclusion that all lands taken into trust by the Secretary under § 465 within the jurisdiction of the Yankton Sioux Reservation and qualify as Indian country under § 1151(a).

C.

Although the district court identified 174.57 acres of miscellaneous land acquired in trust other than under the IRA, it did not directly address the status of these miscellaneous lands. Its separate discussion of dependent Indian communities was broad enough to cover all trust properties, however, including the miscellaneous plots.

In *Venetie* the Supreme Court noted that it had not yet "had an occasion to interpret the term

'dependent Indian communities'" as the term is used in § 1151(b). 522 U.S. at 527, 118 S.Ct. 948. In construing the term for the first time, the Court held that "it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must be set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.*

The miscellaneous trust lands easily meet this definition. The lands were acquired for the use and benefit of the Yankton Sioux Tribe, and the district court found that the federal Bureau of Indian Affairs "negotiates the leases, collects the rents and distributes the rents according to tribal status reports" with respect to these lands. *Gaffey I*, 529 F.Supp.2d at 1055. Testimony by a Federal Bureau of Investigation agent confirmed that the federal government exercises criminal jurisdiction over these trust lands. *Id.* This is more than enough to meet the standard for Indian country under § 1151(b). *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (concluding that "property . . . held by the Federal Government in trust for the benefit" of a tribe qualifies as Indian country).

The defendants argue that the federal government's administration of these lands in trust is insufficient to meet the Supreme Court's definition of dependent Indian communities as it was announced and applied in *Venetie*. That case involved lands held

under the Alaska Native Claims Settlement Act (ANCSA), Pub.L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*). ANCSA was specifically "intended to avoid a 'lengthy wardship or trusteeship.'" *Venetie,* 522 U.S. at 533, 118 S.Ct. 948. As the Court observed, ANCSA explicitly eliminated the Venetie Reservation and transferred the lands "to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33, 118 S.Ct. 948. The land at issue in *Venetie* thus had virtually no resemblance to the Yankton Sioux trust land. Conveyance of the latter remains subject to the Secretary's oversight and approval, and the government continues to hold title to the land in trust, to administer leases on it, and to provide law enforcement services on it.

Consequently, we conclude that the miscellaneous trust lands at issue in this case qualify as dependent Indian communities and are Indian country under § 1151(b).

D.

The Tribe and the United States also urge us to uphold the district court's determination that former allotments which have been continuously held in fee

by Indian owners constitute reservation land. The defendants seek reversal.[14]

Although we might assume that such lands exist, the record does not identify any or their relevant histories. We therefore conclude that this issue is not ripe for resolution. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037 (8th Cir.2000). In *Nebraska Public Power District*, we held that "to resolve an issue lacking factual development simply to avoid a threatened harm would be to favor expedition over just resolution." *Id.* at 1039.

Here, a number of potentially important facts are missing with respect to Indian owned fee lands continuously held by tribal members. To start, no one has identified which, if any parcels, fit within this category. Moreover, the status of such lands may depend on a number of unknown factors, including whether the lands passed into fee ownership before or after the enactment of § 1151(a)'s provision

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[14] The defendants maintain that our mandate in *Gaffey II* limited the district court to an analysis of trust lands. This is incorrect, for we noted that the record then before us was insufficient to address the issue of fee lands continuously held in Indian ownership, 188 F.3d at 1030, and remanded "for further proceedings consistent with this opinion," *id.* at 1031. There was no explicit or implicit instruction limiting the district court to consideration of trust lands.

separating reservation status from ownership, whether the allotments expired at the natural end of the trust period, whether the fee patents were issued at the request of allottees, or whether the fee patents were "forced" on allottees pursuant to the Burke Act. After deciding that this category of land remained reservation, the district court noted that many of these historical facts could be developed by consulting "the land title records maintained by the BIA's Realty Office." *Podhradsky,* 529 F.Supp.2d at 1056-57. Such facts are currently absent in the record before us, and general conclusory descriptions do not clarify who can exercise jurisdiction over an area. Without the benefit of a fully developed record on these issues, we decline to consider this question and accordingly vacate that portion of the district court's decision and judgment.

E.

The Tribe further asserts that two Congressional enactments – the Act of March 3, 1927, § 4, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. § 398d) (1927 Act), and the 1934 IRA – froze the boundaries of the reservation. Consequently, it argues, any lands alienated in fee to whites during the effective period of any such freeze should be considered part of the reservation. The district court determined, however, that the 1927 Act does not apply to the Yankton Sioux Reservation and that whatever freeze the IRA may have imposed was lifted by the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act). The United

States and the defendants ask us to uphold the district court rulings on these issues.

With respect to the 1927 Act, the Tribe maintains that the statute prohibited alterations to the boundaries of any Indian reservation except by act of Congress. The defendants respond that the plain terms of the 1927 Act limit its application to reservations created by executive action rather than by treaty. The district court agreed with the defendants and concluded that the statute was inapplicable in the current dispute.

By the mid nineteenth century, Presidents "had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Sioux Tribe of Indians v. United States,* 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). Although there were initial questions about the legitimacy of these "executive order" reservations, any doubts were removed by *United States v. Midwest Oil Co.,* 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915), in which the Supreme Court held that the President has the power to withdraw lands from the public domain even in the absence of express statutory authority. These executive order reservations are nonetheless distinguishable from those created by treaty or by act of Congress.

The language of the 1927 Act does indeed limit its application to executive order reservations: "[H]ereafter changes in the boundaries of reservations created by *Executive* order, proclamation, or

otherwise for the use and occupation of Indians shall not be made except by Act of Congress. . . ." 44 Stat. at 1347 (emphasis added). The natural meaning of this language is that it applies only to reservations created by the executive branch, whether by executive order, executive proclamation, or other executive action, and *Sioux Tribe of Indians* recognizes as much. 316 U.S. at 325 n. 6, 62 S.Ct. 1095 ("In 1927, Congress added a provision that any future changes in the boundaries of *executive order reservations* should be made by Congress alone." (emphasis added)). The Yankton Sioux Reservation was created by the 1858 Treaty, is not an executive order reservation, and is therefore outside the freeze contemplated by this statute.

The Tribe also argues that the 1934 IRA froze the reservation's boundaries. Section 2 of that act indefinitely extended the trust period for all outstanding allotments, 48 Stat. at 984 (codified at 25 U.S.C. § 462), while § 4 states that "[e]xcept as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands . . . shall be made or approved. . . ." *Id.* at 985 (codified as amended at 25 U.S.C. § 464). The district court concluded that these provisions effectively froze any further diminishment of the Yankton Sioux Reservation, but it also concluded that the Supervised Sales Act, ch. 293, 62 Stat. 236 (1948) (codified at 25 U.S.C. § 483) (Sales Act), lifted whatever freeze was imposed. *See Oglala Sioux Tribe*, 708 F.2d at 330-31 (concluding that the Sales Act lifted restrictions).

We have never squarely confronted the effect of the IRA on the Secretary's authority under the Burke Act to issue fee patents to "competent" allottees, thereby removing trust restrictions on the alienation and conveyance of Indian lands. However, in *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326 (8th Cir.1983), we assumed without deciding that the IRA had effectively frozen the Secretary's ability to issue fee patents. *Id.* at 330. In the same case, we also determined that the Sales Act had lifted any such freeze. *Id.* at 330-31.

The Tribe argues that allotments on the Yankton Sioux Reservation were unaffected by the Sales Act since they had been granted under the Dawes Act and the 1891 Act, not under the IRA. While it is true that by its terms the Sales Act applies to allotments "held . . . under" the IRA, 25 U.S.C. § 483, we concluded in *Oglala Sioux Tribe* that by extending indefinitely the trust periods of previously awarded allotments, the IRA brought within its protection even allotments awarded prior to its enactment. 708 F.2d at 331. In other words, the Yankton Sioux allotments, although originally granted under the Dawes Act and the 1891 Act, would have expired but for the IRA's extension of the trust period. That is enough for them to be "held . . . under" the IRA. "[T]he allotments would not be 'held' . . . at all without the Indian Reorganization Act." *Id.* Since the trust periods on the Yankton allotments would have expired but for the IRA, they are "held" under that statute and any freeze imposed on their conveyance was lifted by the Sales Act.

The Tribe argues that even if the Sales Act did undo an IRA imposed freeze, land conveyances in fee to whites during the effective period of the freeze were improper and should be disregarded for the purpose of defining the reservation's current boundaries. The Tribe's arguments suffer from an insufficient factual record, however. As the district court noted with respect to the Tribe's 1934 freeze claim, "no proper foundation was established for the admission of . . . evidence" indicating that any land would have been affected by such a freeze. *Gaffey I*, 529 F.Supp.2d at 1051. We conclude that the Tribe's claim that the reservation boundaries were frozen in 1934 is not ripe for resolution on the record before the court.

V.

In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a). Furthermore, lands originally part of the Tribe's 1858 reservation regained their status as reservation land under § 1151(a) when acquired in trust under the Indian Reorganization Act. The miscellaneous trust lands, by contrast, qualify as part of a dependent Indian community and are therefore Indian country under § 1151(b). Finally, the record regarding fee lands continuously held by tribal members is not ripe for review.

With respect to the judgment of the district court, we therefore:

(1) affirm insofar as it concluded that the agency trust lands, the outstanding allotments, and the IRA trust lands are part of the Yankton Sioux Reservation and are Indian country under § 1151(a),

(2) affirm its alternative holding that the miscellaneous trust lands constitute a dependent Indian community and are Indian country under § 1151(b),

(3) vacate the district court's holding that fee lands continuously held in Indian ownership are reservation under § 1151(a), and

(4) affirm its denial of all other claims for relief.

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529 F.Supp.2d 1040

United States District Court,
D. South Dakota,
Southern Division.
YANKTON SIOUX TRIBE, and its individual members, Plaintiffs,
United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiff-Intervenor,
v.
Scott PODHRADSKY, States Attorney of Charles Mix County, et al., Defendants.
No. CIV 98-4042.

Dec. 19, 2007.

James G. Abourezk, Sioux Falls, SD, for Plaintiffs.

Mark E. Salter, Jan L. Holmgren, Diana J. Ryan, Assistant U.S. Attorneys, Sioux Falls, SD, for United States.

John P. Guhin, Meghan N. Dilges, Pierre, Scott J. Podhradsky, Lake Andes, Tommy Drake Tobin, Winner, SD, for Defendants.

MEMORANDUM OPINION AND ORDER

LAWRENCE L. PIERSOL, District Judge.

This case is on remand from the Eighth Circuit Court of Appeals.[1] A trial to the Court was held on

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[1] When this case was remanded by the Eighth Circuit, it was a consolidated action with *Yankton Sioux Tribe v. Southern*

(Continued on following page)

November 13 and 14, 2007. For the reasons set forth below, the Court finds the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a): (a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe; (b) land allotted to individual Indians that remains held in trust; (c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and (d) Indian owned fee land that has continuously been held in Indian hands.

Missouri Waste Mgmt Dist., CIV 94-4217 (D S D), and both cases were remanded Although the Court has not dismissed Southern Missouri Waste Management District ("Southern Missouri") as a party to this litigation, it appears from the record that Southern Missouri is no longer taking an active role in this litigation. Southern Missouri filed a Statement On Issues Remaining After Remand, Doc 197, on June 28, 2004, and counsel for Southern Missouri, Kenneth Cotton, appeared at a hearing held by the Court in this case on October 14, 2004, *see* Doc. 222 Thereafter, Southern Missouri has made no appearances by counsel and has filed nothing additional with the Court. Mr. Cotton continues to receive notice of entry of the Court's Orders in this case from the Clerk of Court and he is still listed as counsel of record for Southern Missouri on the Court's docket. During the Court trial in this action in November 2007, the Court observed Southern Missouri's counsel, Kenneth Cotton, in the audience and he made no attempt to make an appearance for Southern Missouri or object to the trial being conducted without Southern Missouri's participation. Southern Missouri is bound by this decision

I. BACKGROUND

It must be decided on remand what remains of the Yankton Sioux Reservation following the Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) ("*Yankton Sioux Tribe*"), holding that the reservation had been diminished, and the Eighth Circuit's decision in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir.1999) ("*Gaffey II*"). The Supreme Court held that the Yankton Sioux Reservation was diminished by the land ceded to the United States by the Yankton Sioux Tribe at the end of the nineteenth century. *See Yankton Sioux Tribe*, 522 U.S. at 358, 118 S.Ct. 789. The issue of whether the Yankton Sioux Reservation was disestablished, however, was not addressed by the Supreme Court, and the case was remanded for further proceedings. *Id.* On remand, this Court held that the Yankton Sioux Reservation was not disestablished, that all nonceded lands continued to be part of the reservation, and that all nonceded lands were subject to federal criminal jurisdiction. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D.1998) ("*Gaffey*"). On appeal, the Eighth Circuit affirmed this Court's decision that the Yankton Sioux Reservation was not disestablished, but found that the reservation was "further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II*, 188 F.3d at 1030. Those lands are no longer "part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of

18 U.S.C. § 1151." *Id.* In *Gaffey II*, the Eighth Circuit made clear that it was faced with considering "the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians." 188 F.3d at 1017. Further, the Eighth Circuit explained that, "[t]he question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries." *Id.* It should be reconfirmed that this case involves jurisdiction issues and does not affect title to real estate.

Regarding the boundary issue, the Eighth Circuit held that, "the original exterior treaty boundaries of the reservation have not been maintained." *Gaffey II*, 188 F.3d at 1030. The Eighth Circuit found that, "[t]he text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non Indian hands." *Gaffey II*, 188 F.3d at 1030.

Addressing land now owned in fee by individual Indians, the Eighth Circuit assumed that such land "is not under tribal jurisdiction unless it is found to be 'within the limits of [the] Indian reservation.'" *Id.* (quoting 18 U.S.C. § 1151(a)). Based upon the record before the Eighth Circuit, however, it was unable to

define the precise boundaries of what remains of the Yankton Sioux Reservation. *Id.* Accordingly, on remand the Court is required to develop a further record and determine what the boundaries are of the Yankton Sioux Reservation. Contrary to the position of the Tribe, no one line can circumscribe what remains of the Yankton Sioux Reservation. Also, contrary to the position of the Defendants, the Yankton Sioux Reservation does exist.

Prior to the trial, the Court in 2006 set forth in a Memorandum Opinion and Order the issues that would be considered on remand. (Memorandum Opinion and Order, Doc. 223.) In that decision, the Court determined the following issues are to be decided in this remand proceeding: (1) Whether the boundaries of the Yankton Sioux Reservation were frozen by the enactment of 25 U.S.C. § 398d, which the Tribe refers to as "the 1927 Act"; (2) If the boundaries of the Yankton Sioux Reservation were not frozen by the 1927 Act, were the boundaries frozen by the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77), referred to as "the 1934 Act", such that all lands alienated to non-Indians after 1934 and prior to the 1948 Supervised Sales Act, 25 U.S.C. § 483, are within the boundaries of the Yankton Sioux Reservation; (3) What lands are currently trust lands; (4) Are the trust lands "Indian country" under 18 U.S.C.

§ 1151(a)[2] or § 1151(c)[3]; and (5) What is the reservation status of nonceded fee lands *to the extent that* such status has not been decided by the appellate courts.

Defendants' primary arguments are that the Court should find the Yankton Sioux Reservation has been disestablished, that there are no remaining boundaries of the reservation and that no lands within the former reservation constitute "reservation" under 18 U.S.C. § 1151(a). They contend none of the individual categories of land identified by the courts or the parties constitute "reservation" under 18 U.S.C. § 1151(a). Contrary to the United States' position, Defendants contend each individual parcel of land taken into trust does not become a discrete "reservation" under 18 U.S.C. § 1151(a), with its own boundaries, and each piece of allotted land does not have such "reservation boundaries." Defendants

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[2] 18 U.S.C. § 1151(a) provides as follows:

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . .

[3] 18 U.S.C. § 1151(c) provides as follows:

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means . . . (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

argue the Tribe's position that the northern 1858 boundary is gone but that the southern 1858 boundary remains is untenable. Set forth immediately below are more specific arguments advanced by Defendants in support of their general arguments described above.

Defendants argue there are no "reservation" boundaries as that term is defined under 18 U.S.C. § 1151(a), because the reservation has been disestablished and Congress has not created new boundaries. Congress' failure to create new boundaries results in the Yankton Sioux Reservation having no boundaries and the Courts lack the power to themselves create such boundaries, according to Defendants. Next, Defendants argue the South Dakota Supreme Court's determination in *Bruguier v. Class,* 599 N.W.2d 364 (S.D.1999), that the Yankton Sioux Reservation has been disestablished, is correct. In a similar vein, Defendants argue the Eighth Circuit's determination that the Yankton Sioux Reservation has not been disestablished is inconsistent with the Supreme Court's decision in *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). The law of this case is that the Yankton Sioux Reservation has been diminished and not disestablished. *DeCoteau* is distinguishable and does not control nor affect this controversy. The Tribe and the Defendants were advised prior to the Court trial that their respective positions that there was no diminishment and that there was disestablishment would not be revisited in this trial. (Order, Doc. 399, Nov. 8, 2007.)

Addressing claims raised by the Tribe following the remand, the Defendants argue 25 U.S.C. § 398d, or the "1927 Act", did not freeze the boundaries of the Yankton Sioux Reservation as of 1927. First, Defendants contend the Tribe waived this argument by not raising it earlier in this litigation and is barred by the issuance of the mandate by the Eighth Circuit and the law of the case doctrine. Second, Defendants contend the 1927 Act does not apply to the Yankton Sioux Reservation because that Act applies only to executive order reservations, not to reservations created by treaty, as was the Yankton Sioux Reservation. Finally, Defendants maintain that even if the Court determines the 1927 Act could apply to treaty reservations, the Act did not "freeze" the boundaries of the Yankton Sioux Reservation because the intent of the 1927 Act was to impose limits on the authority of the President to enlarge or contract reservation boundaries. The 1927 Act was not intended to limit the ability of Congress to continue the policy of former acts it passed, such as the 1894 Act by which Congress intended to increase jurisdiction of the State of South Dakota on the Yankton Sioux Reservation as white settlers came on to the opened lands. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 ("1894 Act"); *see Gaffey II,* 188 F.3d at 1028 (explaining that the 1894 Act "intended to diminish the reservation by not only the ceded lands, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders.").

Another claim of frozen boundaries advanced by the Tribe is under 25 U.S.C. §§ 462 and 464, which was referred to above as "the 1934 Act". Defendants counter the Tribe's arguments by claiming the Tribe has waived this argument and it is prohibited by the Eighth Circuit's mandate in this case, as well as by the law of the case doctrine. The second argument advanced by Defendants is that the 1934 Act was optional for Indian tribes and, thus, the intent of Congress could not have been to "freeze" reservation boundaries. In addition, Defendants argue the legislative history and text of the 1934 Act do not support the Tribe's claim of "freezing" reservation boundaries.

Next, Defendants disagree with the United States' argument that roughly 6,000 acres of land taken into trust under the 1934 Act are "Indian country" under 18 U.S.C. § 1151(a). Defendants contend the text of the 1934 Act, the legislative history, early treatment of the lands, case authority, and an admission by the United States in another case all defeat the notion that the trust lands are "reservation" under § 1151(a). The textual argument is that the structure of the 1934 Act precludes a finding that Section 5, 25 U.S.C. § 465, "trust" lands are automatically Section 7, 25 U.S.C. § 467, "reservation" lands. Specifically, Defendants interpret Section 7 to require a "proclamation" by the Secretary of the Interior that the lands taken into trust under Section 5 are "reservation" lands. In support of this argument, Defendants cite *United States v. Stands,* 105 F.3d 1565 (8th Cir.1997). Defendants contend

Stands is directly on point and holds that placement of land into trust for an Indian tribe does not make such land "reservation" or "Indian country."

An additional argument raised by the Defendants is that certain lands claimed as trust land have never been formally accepted into trust status, and, therefore, such lands are neither trust land nor reservation. Specifically, the Defendants argued in their pre-trial brief that 3,201 acres of land, constituting thirty parcels, are not trust land because the United States cannot produce any written acceptance of these lands into trust status. At trial, however, the Court ruled the Defendants are barred from challenging the trust status of these lands because the United States has not waived its sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a(a), as to lands held in trust for Indians, and therefore, the Court lacks jurisdiction to even consider the merits of Defendants' challenge to the United States title to the lands at issue. *See Governor of Kansas v. Kempthorne*, 505 F.3d 1089 (10th Cir.2007) (the courts lack jurisdiction to address the merits of a quiet title action against the United States involving trust lands because the United States has not waived its sovereign immunity under the Quiet Title Act as to land held in trust for Indian tribes).

As to the allotted lands, the Defendants argue the remaining allotted lands within the 1858 boundaries are not "reservation" or "Indian country" under 18 U.S.C. § 1151(a). Rather, Defendants argue the allotted lands are "Indian country" under 18 U.S.C.

§ 1151(c), to the extent that such allotted lands have not left Indian hands. In support of this argument, Defendants point to the Eighth Circuit's holding that the Yankton Sioux Reservation "has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151." *Gaffey II,* 188 F.3d at 1030. Defendants conclude the allotted lands cannot be "reservation" under § 1151(a), because the Supreme Court ruled in *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), that allotted land leaving allotted status remains "Indian country" *only* if it is on a "reservation." The short answer is that such lands are on a reservation because those lands form a part of the boundaries of this checkerboard reservation.

The Yankton Sioux Tribe's position is that the Court should draw a boundary in the northern part of Charles Mix County that excludes the ceded lands referred to by the Supreme Court and leave untouched the east, west and south boundaries of the 1858 Yankton Sioux Reservation. Exhibit 9, received as an illustrative exhibit at the trial, depicts the Tribe's "suggested boundary" of the Yankton Sioux Reservation. This Exhibit shows a reservation with one continuous boundary. A checkerboard reservation should be avoided, argues the Tribe, because drawing a boundary around each parcel of trust land, or each

Indian owned parcel, would result in a less desirable checkerboard reservation. The Tribe also points out that the Defendants' position, that the Yankton Sioux Reservation was disestablished, has been consistently rejected by the Supreme Court, the Eighth Circuit and this Court.

The United States likewise argues the Defendants' arguments regarding disestablishment are foreclosed by the Eighth Circuit's holding that the Yankton Sioux Reservation has not been disestablished. *See Gaffey,* 188 F.3d at 1030 ("[W]e hold that the Yankton Sioux Reservation has not been disestablished. . . ."). In addition, the United States contends the Defendants' challenge to certain deeds placing land in trust for the Yankton Sioux Tribe thirty to seventy years ago, is precluded because the United States has not waived its sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a, and by the six-year statute of limitations for actions brought under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* As set forth above, the Court agreed with the United States' argument and held during the trial that the Defendants are barred from challenging the United States' title to the lands it holds in trust for the Yankton Sioux Tribe and its members. *See Governor of Kansas,* 505 F.3d at 1089.

The United States' position on what remains of the diminished Yankton Sioux Reservation is: the land originally set aside for the Yankton Sioux by treaty in 1858 that are Indian trust allotments that remain in Indian ownership; those lands returned to

the Tribe by Act of February 13, 1929, 45 Stat. 1167; and, those lands taken into trust for the Tribe under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.* These lands, according to the United States, are Indian country under 18 U.S.C. § 1151(a), as they are "within the limits of any Indian reservation under the jurisdiction of the United States Government. . . ." As to the Indian owned fee land, the United States does not take a position on whether such land is included in the Yankton Sioux Reservation, leaving that issue for the Tribe to pursue. The United States also does not take a position on the 1927 Act and 1934 Act claims advanced by the Tribe.

As to the lands taken into trust for the Tribe under the 1934 Act, the United States argues that although the 1858 original exterior boundaries no longer serve to separate Indian country from areas under State jurisdiction, when the property is reacquired in trust within those boundaries, it becomes reservation and Indian country pursuant to 18 U.S.C. § 1151(a).

Addressing one of the Defendants' arguments, the United States contends its conclusion that tribal trust land is reservation is not inconsistent with the Secretary of the Interior's separate authority under 25 U.S.C. § 467 to add lands to existing reservations. Contrary to the Defendants' claim, the United States contends the plain reading of § 467 is that there is no requirement for proclamation in order to add lands to an existing Indian reservation. The United States correctly distinguishes the case cited by the

Defendants, *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C.Cir.2007) ("*Citizens*"), from the present case because *Citizens* involved the creation of a new reservation that would require a proclamation under 25 U.S.C. § 467. Further, *Citizens* involved the creation of a new reservation that would qualify for gaming as an "initial reservation" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which is not involved in the present case.

A second case the United States distinguishes is *South Dakota v. United States Dept. of Interior*, 487 F.3d 548 (8th Cir.2007). In *South Dakota*, the Flandreau Santee Sioux Tribe sought to place land in trust that was never within its reservation boundaries and the Eighth Circuit left unanswered the question of whether "all land taken into trust *off reservation* . . . constitutes Indian country." *Id.* at 553 (emphasis added). Accordingly, the *South Dakota* case did not involve the present question of whether land taken into trust within the original exterior boundaries of an Indian reservation that has not been disestablished is Indian country under 18 U.S.C. § 1151(a).

In addition to the above positions, the United States contends the lands acquired in trust under the 1934 Act can constitute an informal or de facto reservation under 18 U.S.C. § 1151(a).

Another category of lands at issue is the reserve lands, which were lands reserved for the Tribe for agency, schools, and other purposes and reserved from sale to settlers. The United States' position

regarding the reserve lands is that the *Gaffey* court found that these lands "were expected to remain outside of primary state jurisdiction," which, conversely, means they were intended to remain within federal jurisdiction. *Gaffey*, 188 F.3d at 1027. The 1929 Act, 45 Stat. 1167, resolved any doubt about the reserve lands, urges the United States, wherein Congress unambiguously demonstrated its intent that the reserve lands be transferred to the Tribe when they are no longer needed for the original purposes for which they were reserved.

The Court allowed the filing of an amici curiae brief by Charles Mix County landowners, Doc. 335, wherein the landowners urge the Court to reject the Tribe's arguments regarding the 1927 and 1934 Acts and to conclude the only lands to be reservation or Indian Country are those lands which are currently held in trust by the United States for the benefit of an Indian person.

II. DISCUSSION

The Supreme Court has made clear that "only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

The inescapable result of the prior court decisions interpreting Congressional acts affecting the Yankton Sioux Reservation is that it is a checkerboard reservation. The Eighth Circuit clearly envisioned a checkerboard reservation pursuant to its dual holdings that the 1858 reservation boundaries are no longer in effect and that, "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a). . . ." *Gaffey II*, 188 F.3d at 1030. The land reserved to the federal government and returned to the Tribe was identified as one category of trust land on the Yankton Sioux Reservation and it consists of scattered lands throughout the original 1858 reservation. The Eighth Circuit made clear that these scattered lands continue to be Indian country under 18 U.S.C. § 1151(a). As with the reserve lands, the two additional categories of trust lands identified by the Eighth Circuit consist of scattered lands within the original 1858 boundaries. *See id.* Although the Eighth Circuit was able to identify the categories of trust land existing on the Yankton Sioux Reservation, the record had not been developed as to which tracts of land fall within those categories. Accordingly, on remand the parties were directed to develop the record as to which tracts of land on the Yankton Sioux Reservation are in the three categories of trust land identified by the Eighth Circuit. The trial record does now contain that information.

The Court will first address the Tribe's claims that the 1927 and 1934 Acts froze the boundaries of

the Yankton Sioux Reservation. Next, the Court will discuss whether trust lands are reservation land and whether the land qualifies as Indian country under 18 U.S.C. § 1151(a) or (c). United States' claim that the Yankton Sioux Reservation is a de facto or informal reservation will then be discussed. The final categories of land that will be addressed is Indian-owned fee land continuously held in Indian hands. Finally, the Court will discuss dependent Indian communities.

A. 1927 Act Claim

The Tribe contends Congress froze the reservation boundaries when it enacted 25 U.S.C. § 398d, referred to above as "the 1927 Act", such that all lands sold to non-Indians after 1927 and before the Supervised Sales Act of 1948, 62 Stat. 236, codified at 25 U.S.C. § 483, are within the reservation boundaries. The 1927 Act provides as follows; "**§ 398d. Changes in boundaries of Executive order reservations.** Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." 25 U.S.C. § 398d.

Defendants' first argument is that the Tribe waived this claim by failing to raise it earlier in the litigation. In a Memorandum Opinion and Order, Doc. 223, the Court held the issue of the 1927 Act would be decided in these remand proceedings. The specific

reasons for rejecting Defendants' waiver arguments as to both the 1927 Act claim and the 1934 Act claim were explained by the Court in its Response to Defendants' Petitions for Writ of Mandamus, filed with the Eighth Circuit in April 2007:

> Regarding the 1934 Act argument advanced by the Tribe on remand and referred to in the Court's Memorandum Opinion and Order dated December 13, 2006, the Eighth Circuit clearly contemplated argument and development of the record on remand of "land taken into trust under the Indian Reorganization Act of 1934." *Gaffey II*, 188 F.3d at 1030. Thus, the Eighth Circuit clearly contemplated the Court would consider arguments concerning the 1934 Act on remand. The Eighth Circuit recognized there will be additional issues on remand that were not decided in prior proceedings due to the limited development of the record on issues other than disestablishment or maintenance of the 1858 boundaries. *Id.* at 1030-31. The Court finds the Tribe's arguments regarding the 1927 Act, at least at this point in the proceedings, are similar in nature to the arguments regarding the 1934 Act. If the Eighth Circuit believed that all arguments not previously raised by the Tribe were waived, there would have been no reason to remand this case to this Court for development of the record and further proceedings consistent with its opinion. The Eighth Circuit recognized the parties "followed an all or nothing strategy (the State arguing disestablishment and the

> Tribe claiming maintenance of the 1858 boundaries)," *Gaffey II*, 188 F.3d at 1030, which resulted in an incomplete record. Moreover, it would have been a waste of judicial resources for the parties and the Court to make the necessary findings and conclusions regarding the 1927 Act and the 1934 Act without a final ruling regarding disestablishment or maintenance of the 1858 boundaries.

Petition for Writ of Mandamus, Nos. 07-1723, 07-1779, *In re: Michael Rounds, et al.*, (8th Cir. Mar. 22, 2007) (District Court's Response to Defendants' Petitions for Writ of Mandamus). Defendants' waiver, law of the case and mandate rule arguments are rejected for the reasons quoted above.

Citing *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942) and the 1927 Act's legislative history[4], the Defendants

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[4] The Defendants argue if the 1927 Act were to apply to *all* reservations, including treaty reservations, the language in the statute specifying its application to executive order reservations would have been unnecessary In support of this argument, the Defendants quote comments from a House debate distinguishing between treaty and executive order reservations

> Now let us go just a little into the history of the difference between a treaty reservation and an Executive-order reservation. A treaty reservation is one by which the Indians are placed on certain areas of land under an agreement with the Indians-land usually formerly occupied and owned by these same Indians under right of occupancy. An Executive-order reservation is that which is set aside for the tribe by Executive

(Continued on following page)

contend the 1927 Act applies only to reservations created by Executive order or proclamation and not to reservations created by treaty. There is no dispute that the Yankton Sioux Reservation was created by treaty, rather than by Executive order or proclamation. The Tribe cites no case law or legislative history in support of its claim that the reservation boundaries were frozen as of 1927. Rather, the Tribe argues the "language of that statute is eminently clear." (Plaintiff's Supplemental Brief, Doc. 367 at p. 2.).

The Court finds the language of 25 U.S.C. § 398d unambiguously applies to reservations created by action of the Executive, whether it be by order, proclamation or otherwise, and does not apply to reservations created by treaty, such as the Yankton Sioux Reservation. *See Sioux Tribe*, 316 U.S. at 325 n. 6, 62 S.Ct. 1095 (distinguishing between executive order reservations and treaty reservations and noting that with the 1927 Act, Congress provided that, "any future changes in the boundaries of executive order reservations should be made by Congress alone."). Accordingly, the boundaries of the Yankton Sioux Reservation were not frozen by the 1927 enactment of 25 U.S.C. § 398d.

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proclamation and this character of reservation is also usually composed of a portion of lands formerly occupied by such Indians.

68 Cong Rec. 4571(1927).

B. 1934 Act Claim

The second frozen boundaries claim advanced by the Tribe is that the Indian Reorganization Act, referred to above as "the 1934 Act", froze the boundaries of the Yankton Sioux Reservation upon its enactment. Section 2 of the 1934 Act provides that, "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462. In addition, the sale of allotments was restricted in 1934 under 25 U.S.C. § 464, which stated that, "[e]xcept as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . . shall be made or approved. . . ."

Defendants' arguments of waiver, law of the case and violation of the mandate as to the 1934 Act claim are rejected for the same reasons explained above for rejecting these arguments as to the 1927 Act claim.

It was clearly Congress' intent in enacting the 1934 Act to halt the loss of land on the nation's Indian reservations as a result of the allotment policy. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.1978) (explaining that the Indian Reorganization Act of 1934 "reflected a new federal policy of halting the loss of Indian lands which had occurred under statutes that allotted tribal lands to individual Indians and disposed of 'surplus' land under settlement laws."). It naturally follows that one result of the

1934 Act was to "freeze" the boundaries of the Yankton Sioux Reservation.

Legislative history is quoted by the Defendants, but legislative history is not persuasive if the statute itself is clear on its face. *See United States v. Maswai,* 419 F.3d 822, 824 (8th Cir.2005) (explaining that a court's "task in interpreting legislation is to start with the plain meaning of its words, and 'only if the statute is ambiguous do we look to the legislative history to determine Congress's intent.'"). Sections 462 and 464 are clear. There was to be "no sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . ." 25 U.S.C. § 464. Self-serving opinions by various government officials that they could still transfer Indian lands, despite the 1934 Act, are contrary to law and provide no authority for such transfers.

The "freezing" of the boundaries of the Yankton Sioux Reservation ended in 1948 when Congress enacted the Supervised Sales Act, 25 U.S.C. § 483[5],

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[5] Section 483 provides as follows

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provision of the Act of June 18, 1934 (48 Stat. 984) [25 U S.C. § 461 et seq.], or the Act of June 26, 1936 (49 Stat 1967) [25 U S C § 501 et seq].

25 U.S C. § 483

which lifted restrictions of the 1934 Act and allowed the Secretary of the Interior to grant patents in fee to Indian owners upon application. As explained below in the discussion of the Indian country status of trust lands, the Court finds that land placed into trust for the Yankton Sioux Tribe and its members under the 1934 Act is Indian country under § 1151(a). Rather than continuing to freeze the boundaries, the Court finds the boundaries of the Yankton Sioux Reservation change when land is taken into trust under the 1934 Act. Accordingly, the Court accepts that portion of the Tribe's claim that the 1934 Act froze the boundaries of the Yankton Sioux Reservation at the time of its enactment, but rejects the Tribe's claim that the freeze continued through the present time. The "freeze" ended in 1948, thereby nullifying the present and ultimate effect of a "freeze" from 1934 to 1948. *See Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Hallett,* 708 F.2d 326, 330-31 (8th Cir.1983) ("Assuming that Section 4 of the Indian Reorganization Act did limit the Secretary's authority to issue fee patents to individual allottees, Congress lifted that limitation in 1948, as to trust lands 'held. . . . under' the Indian Reorganization Act of 1934, by passing 25 U.S.C. § 483 (1976).") (footnote omitted).

Likewise, the Supervised Sales Act of 1948 cured those real estate transfers. The "freeze" was as to land transfers and not as to any one boundary, because even in 1934 to 1948 there was no one, single reservation boundary. The various boundaries that

were frozen during that time period were various tracts of Indian land held by the United States. At trial, the Tribe claimed there were tracts of land affected by this 1934 freezing claim, but no proper foundation was established for the admission of such evidence so this 1934 freezing analysis might be a moot issue. In addition, there is nothing in the record to indicate that any land was subject to the Sioux exception as stated in 25 U.S.C. § 474 (Section 14 of the 1934 Act). Even if it is not a moot issue, any resulting title defects were cured by the Supervised Sales Act of 1948.

Finally, it is not clear whether or not the Tribe properly excluded itself from the operation of the 1934 Act. It takes affirmative steps for such exclusion and the record does not show full compliance with the requirements for exclusion from the 1934 Act, so no exclusion is found even though it was apparently attempted. *See* 25 U.S.C. § 478.

C. Status of Trust Lands on Yankton Sioux Reservation

The Eighth Circuit remanded this case for the Court to make "any necessary findings relative to the status of Indian lands which are held in trust," because "[t]he current amount of Indian trust land on the Yankton Sioux Reservation [was] unclear from the record [before the Eighth Circuit]." *Gaffey II*, 188 F.3d at 1030. During the Court trial in this action, the parties identified the tracts of land on the Yankton

Sioux Reservation that are within the three categories of trust land identified by the Eighth Circuit: "1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934." *Id.*

Four spreadsheets, admitted at trial as Exhibits 202, 203, 204 and 211, list the current tracts of trust land on the Yankton Sioux Reservation. In addition to the spreadsheets, there are sub-exhibits, which provide documentation relating to each of the tracts of land listed on the spreadsheets. During the trial, the parties agreed that some of the tracts were listed in the wrong category on the spreadsheets. Accordingly, after the trial the United States submitted a Motion clarifying the stipulations entered into at trial by the parties regarding certain tracts of land and attached revised spreadsheet Exhibits and explaining which tracts were to be moved to different categories. The Court entered an Order granting this unopposed motion. (Doc. 423.) In the revised spreadsheet exhibits submitted after the Court trial, Exhibit 202 lists the tracts of trust land on the Yankton Sioux Reservation that were taken into trust by the United States after the 1934 Act, totaling 6,444.47 acres. Revised Exhibit 203 lists the tracts of trust land on the Yankton Sioux Reservation that were pre-1934 fee to trust or non-reserve Secretarial order trust lands, totaling 174.57 acres. Exhibit 204 lists the tracts of land on the Yankton Sioux Reservation that were

allotted trust lands and are now tribal trust lands, totaling 4,496.58 acres. Exhibit 211 lists the tracts of land on the Yankton Sioux Reservation that are allotted trust lands, totaling 25,555.08 acres.

The Eighth Circuit recognized in *Gaffey II* that before the modern definition of Indian country, set forth in 18 U.S.C. § 1151, was established in 1948, "Indian lands were defined to include 'only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.'" *Gaffey II*, 188 F.3d at 1022. Thus, determining Congressional intent before 1948 as to "reservation" status under § 1151(a) "is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by . . . legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country." *Id.* at 1021. "The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign." *Id.* at 1022.

1. Reserve lands

Defendants' argument that none of the categories of land defined by the Courts or the parties constitute "reservation" under 18 U.S.C. § 1151(a), is a veiled attempt to discredit the result of the Eighth Circuit's decision in *Gaffey II*, which is that the Yankton Sioux

Reservation is now a checkerboard reservation. The Eighth Circuit clearly envisioned the Yankton Sioux Reservation is a checkerboard reservation pursuant to its dual holdings that the 1858 reservation boundaries are no longer in effect and that, "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a). . . ." *Gaffey II*, 188 F.3d at 1030. The first category of trust land, i.e., land reserved to the federal government in the 1894 Act and later returned to the Tribe, consists of scattered lands throughout the original 1858 reservation. The Eighth Circuit made clear that these scattered reserve lands continue to be Indian country under § 1151(a), which can only mean that there is a checkerboard reservation. The other two categories of trust land described by the Eighth Circuit likewise consist of scattered land within the 1858 boundaries of the Yankton Sioux Reservation.

2. Land allotted to individual Indians that remains held in trust

The Eighth Circuit declared that although the Yankton Sioux Reservation has not been disestablished, "it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II*, 188 F.3d at 1030. Accordingly, if originally allotted land passed out of Indian hands at any time after it was allotted, it is not part of the Yankton Sioux Reservation. Trial Exhibit 211 identifies the tracts of

land on the Yankton Sioux Reservation that are allotted trust lands. As to this category of lands, the Defendants contend the law of the case pursuant to *Gaffey II*, is that allotted land can only be Indian country under 18 U.S.C. § 1151(c) and cannot be Indian country under § 1151(a).

Contrary to the Defendants' arguments, the United States contends allotted land that remains held in trust is reservation, and thus Indian country under § 1151(a), as a result of the Eighth Circuit's findings that the Yankton Sioux Reservation was not disestablished and that the text of the 1894 Act establishes the Congressional intent to "reserve land to be used to care for continued tribal interests," *Gaffey II*, 188 F.3d at 1028, in combination with the overarching principle that "[a]fter land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise," *Solem*, 465 U.S. at 469, 104 S.Ct. 1161. Due to the sparsity of the factual record, the Eighth Circuit was unable to identify on the record before it which allotted land remained held in trust by the United States. *See Gaffey II*, 188 F.3d at 1028, 1030. That information was presented to the Court on remand in Trial Exhibit 211.

The Court agrees with the United States' position and further notes that there has been no finding by the appellate courts that the Yankton Sioux Reservation has been diminished by allotted land that remains held in trust. The Court finds no evidence of Congressional intent to so diminish the Yankton

Sioux Reservation. Accordingly, the land allotted to individual Indians that remains held in trust is reservation and is Indian country under 18 U.S.C. § 1151(a).

3. Lands taken into trust under the 1934 Act

As to the lands taken into trust under the 1934 Act, the United States claims that although the 1858 original exterior boundaries no longer serve to separate Indian country from areas under State jurisdiction, when the property is reacquired in trust within those boundaries, it becomes reservation and Indian country pursuant to 18 U.S.C. § 1151(a). Defendants, however, contend a parcel of land taken into trust under 25 U.S.C. § 465, part of the 1934 Act, cannot be reservation land unless there is a proclamation under 25 U.S.C. § 467 that it is a new reservation or is added to an existing reservation. Section 467 provides that:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 467.

Defendants' interpretation of 25 U.S.C. § 467 is strained. Contrary to Defendants' argument, the United States contends its conclusion that tribal trust land is reservation is not inconsistent with the Secretary of the Interior's separate authority under 25 U.S.C. § 467 to add lands to existing reservations. The United States argues the plain reading of § 467 is that there is no requirement for proclamation in order to add lands to an existing Indian reservation. The United States argues the case cited by the Defendants, *Citizens*, 492 F.3d at 460, is distinguishable from the present case because *Citizens* involved the creation of a *new* reservation that would require a proclamation under 25 U.S.C. § 467. Further, *Citizens* involved the creation of a new reservation that would qualify for gaming as an "initial reservation" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which is not involved in the present case. The Court agrees that *Citizens* is inapplicable to the case before the Court for the reasons advanced by the United States.

A second case the United States seeks to distinguish is *South Dakota*, 487 F.3d at 548, which was cited by the Defendants. In *South Dakota*, the Flandreau Santee Sioux Tribe sought to place land in trust that was never within its reservation boundaries and the Eighth Circuit left unanswered the question of whether "all land taken into trust *off reservation* . . . constitutes Indian country." *Id.* at 553 (emphasis added). Accordingly, the Court agrees with the United States that the *South Dakota* case did not

involve the question of whether land taken into trust within the original exterior boundaries of an Indian reservation that has not been disestablished is Indian country under 18 U.S.C. § 1151(a).

The Court interprets 25 U.S.C. § 467 to require a proclamation by the Secretary only in situations where new Indian reservations are being created. As observed by the United States, "[i]t is redundant to proclaim the land a reservation when it is acquired in trust for the Tribe within a reservation that is not disestablished." (Doc. 346 at p. 8.) The acquisition of land not previously within the boundaries of an Indian reservation presents a different situation than acquiring land in trust within the original boundaries of a diminished reservation. The land acquisition regulations under the 1934 Act treat acquisitions on a diminished reservation as an on-reservation acquisition. *See* 25 C.F.R. § 151(f). The Court rejects Defendants' argument and holds that the absence of a proclamation under 25 U.S.C. § 467 for land taken into trust under the 1934 Act, 25 U.S.C § 465, which is within the original boundaries of a diminished reservation, does not prevent the land from being reservation land. Given the Eighth Circuit's holding that the Yankton Sioux Reservation was not disestablished, in combination with its holding that the reserve lands continue to be reservation under § 1151(a), and the Court's finding that a proclamation under 25 U.S.C. § 467 was not required in this case, the Court concludes all land within the original 1858 treaty boundaries of the Yankton Sioux Reservation

held by the United States in trust pursuant to the 1934 Act constitutes reservation and Indian country under 18 U.S.C. § 1151(a).

D. Informal or De facto Reservation

An alternate position advanced by the United States is that all of the land held by the United States in trust for the Tribe and its individual members is a "reservation" for purposes of federal criminal jurisdiction under 18 U.S.C. § 1151(a), even if it is found to not be a formally designated reservation. *See Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). In *Oklahoma Tax Comm'n*, the Supreme Court explained it has "stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" 498 U.S. at 511, 111 S.Ct. 905 (quoting *United States v. John*, 437 U.S. 634, 648-49, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978)). In *United States v. John*, 437 U.S. 634, 648-49, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), the Supreme Court held the federal government had authority to prosecute an Indian, under 18 U.S.C. §§ 1153 and 1151(a), for a crime committed on land held in trust by the United States for the benefit of the Mississippi Choctaw Indians, who were under federal supervision. In that case, the land at issue was later proclaimed to be a

reservation, but the Supreme Court held that prior to the proclamation there was "no apparent reason why these lands, which had been purchased in previous years for the aid of [the Mississippi Choctaw] Indians [and held in trust by the Federal Government for their benefit], did not become a 'reservation,' at least for the purposes of federal criminal jurisdiction at that particular time." *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

In a case considering whether certain land was "Indian country" under 18 U.S.C. § 1151(a), the Eighth Circuit explained, "[i]t is well established that the actions of the federal government in its treatment of Indian land can create a *de facto* reservation, even though the reservation was not created by a specific treaty, statute or executive order." *United States v. Azure*, 801 F.2d 336, 338 (8th Cir.1986). In an effort to avoid this holding in *Azure*, Defendants cite *Stands*, 105 F.3d at 1572, for the proposition that placing land into trust for an Indian tribe does not make it Indian country under 18 U.S.C. § 1151. In *Stands*, the Eighth Circuit stated, "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. But *Stands* does not control the result in this case. *Stands* considered federal jurisdiction, under 18 U.S.C. § 1151(c), on land that was outside the clearly defined boundaries of a reservation. *See id.* Rather than considering jurisdiction under § 1151(c) over allotted land that is outside the clear boundaries of a

diminished reservation, as in *Stands,* the Court is faced in this case with determining what the boundaries are of a diminished reservation. Moreover, as recognized by Chief Judge Karen E. Schreier, the above quoted language in *Stands,* "is dicta which does not overcome the wealth of legal authority establishing that trust land qualifies as 'Indian country.'" *South Dakota v. United States Dep't of Interior,* 401 F.Supp.2d 1000, 1010 (D.S.D.2005) (citing *Oklahoma Tax Comm'n,* 498 U.S. at 511, 111 S.Ct. 905; *United States v. Roberts,* 185 F.3d 1125, 1131 (8th Cir.1999); *Buzzard v. Okla. Tax Comm'n,* 992 F.2d 1073, 1076 (10th Cir.1993), *cert. denied sub. nom. United Keetoowah Band of Cherokee Indians v. Okla. Tax Comm'n,* 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993); *Azure,* 801 F.2d at 338).

Citing *Azure,* 801 F.2d at 338-39, the *Stands* court recognized federal jurisdiction under § 1151(a) may be established if the land at issue is found to be a de facto reservation or dependent Indian community. 105 F.3d at 1572 n. 3. That situation was not addressed in *Stands,* however, because the government had not argued that *Azure* or similar cases applied to the land at issue in *Stands.* Interestingly, the holding in *Stands* was that an individual allotment off the reservation was "Indian country" for purposes of federal criminal jurisdiction. The Court finds the above-quoted language from *Stands* is dicta and is not controlling in the present case, and in any event, for the reasons set forth above, the present case is distinguishable from *Stands.* The Court further finds

the Eighth Circuit's earlier holding in *Azure*, 801 F.2d at 338, applies to the land at issue in the present case.

As to all of the trust land identified in Revised Exhibits 202, 203, 204 and 211, the federal government has validly set apart that land for use of the Yankton Sioux Indians. Donalene Orozo, the Realty Officer in the Bureau of Indian Affair's ("BIA") Yankton Agency in Wagner, testified that her office maintains all leases on trust lands on the Yankton Sioux Reservation. The BIA negotiates the leases, collects the rents and distributes the rents according to tribal status reports. Federal Bureau of Investigation Agent Matthew Miller testified that the FBI exercise criminal jurisdiction over all trust land on the Yankton Sioux Reservation, and does not distinguish between land taken into trust under the 1934 Act, reserve land, or allotted land held in trust. Agent Miller relies upon the BIA Realty Office to advise him whether any particular tract of land is held in trust by the United States. The above-referenced testimony establishes that the federal government provides supervision over all trust lands on the Yankton Sioux Reservation. Based upon the exhibits received during the trial and the testimony of Ms. Orozo and FBI Agent Matthew Miller, the Court concludes the federal government has validly set apart the tracts of land identified in Revised Exhibits 202, 203, 204 and 211 for use of the Yankton Sioux Indians. Accordingly, the trust lands identified in Revised Exhibits 202,

203, 204 and 211 constitute a reservation, at least for purposes of jurisdiction under 18 U.S.C. § 1151(a).

E. Indian-owned fee land continuously held in Indian hands

The Eighth Circuit held that the Yankton Sioux Reservation "has been further diminished by the loss of those lands originally allotted tribal members which have passed out of Indian hands." *Gaffey II,* 188 F.3d at 1030. As to Indian-owned fee lands, the Eighth Circuit assumed "that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be 'within the limits of [the] Indian reservation.' 18 U.S.C. § 1151(a)." *Id.* The Eighth Circuit's diminishment finding is limited to previously allotted lands *which have passed out of Indian hands. Id.* (emphasis added). There has been no finding by an appellate court and this Court finds no evidence on this record that Congress intended to diminish the Yankton Sioux Reservation by previously allotted land now owned in fee which has never passed out of Indian hands. The principle that "[a]fter land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise," *Gaffey II,* 188 F.3d at 1021 (citing *Solem,* 465 U.S. at 470, 104 S.Ct. 1161), applies to these lands. Above, the Court found that trust lands are reservation under 18 U.S.C. § 1151(a), and the Court finds no reason to treat any differently Indian-owned fee land on the Yankton Sioux Reservation, which has been continuously held in Indian hands. Accordingly, the

Court finds that previously allotted land, which is now owned in fee and has been continuously owned by an Indian, retains its reservation status and it is Indian country under 18 U.S.C. § 1151(a).[6]

The Tribe introduced exhibits depicting Indian-owned fee land, but there was no evidence to show whether such land has continuously been held in Indian hands. Unless previously allotted land, which became fee land and passed out of Indian hands, was taken back into trust by the United States, it is no longer part of the Yankton Sioux Reservation under the previous decision of the Eighth Circuit. *See Gaffey II,* 188 F.3d at 1030 (holding that the Yankton Sioux Reservation "has been further diminished by the loss of those land originally allotted to tribal members which have passed out of Indian hands."). Although the record was not fully developed regarding Indian-owned fee land, the Court finds it sufficient for purposes of this remand proceeding to define that category of land as reservation, which is subject to federal criminal jurisdiction under 18 U.S.C. § 1151(a). Whether a particular tract of previously allotted land is Indian-owned fee land that has continuously been held in Indian hands can be verified at any given time by the land title records maintained by the BIA's Realty Office.

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[6] If and when any of that land is sold to a non-Indian, then that land will no longer be a part of the Yankton Sioux Reservation. Who is and who is not an Indian is already well defined in the law.

F. Dependent Indian Community

The Court has considered whether any of the trust lands at issue in this case qualify as Indian country under 18 U.S.C. § 1151(b)[7] as a dependent Indian community. During the trial, the Court questioned the Charles Mix County State's Attorney, Scott Podhradsky, about this possibility. He testified that based upon his predecessor's beliefs, there are three dependent Indian communities in Charles Mix County, which he identified as South Housing in Wagner, North Housing in Wagner and South Housing, just south of Lake Andes.

Other than the above, the record does not contain evidence as to what, if any, other areas might be dependent Indian communities. The Court recognizes that if the Indian population grows in some of the areas in question, other dependent Indian communities might develop.

To the extent any of the trust land discussed in this opinion would be found by an appellate court to not be "reservation" land, and thus not Indian country

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[7] Section 1151(b) provides

> Except as otherwise provided in section 1154 and 1156 of [Title 18], the term "Indian country", as used in this chapter, means . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state. . . .

18 U.S.C. § 1151(b)

under § 1151(a), the Court finds such trust land would nevertheless qualify as Indian country under § 1151(b), as a dependent Indian community. The Supreme Court established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): "a federal set-aside *and* a federal superintendence requirement." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998). It was established at trial that all of the trust land identified in Revised Exhibits 202, 203, 204 and 211 (revised post-trial) has been set aside by the federal government in trust for the Indians residing within the original 1858 boundaries of the Yankton Sioux Reservation. The federal government exercises superintendence over these trust lands, as testified to by Ms. Orozo and FBI Agent Miller. Accordingly, these trust lands meet the two requirements for a dependent Indian community. Similar to the result of finding the trust lands are "reservation" under § 1151(a), as described in this opinion, a finding that the trust lands qualify as Indian country under § 1151(b) results in the Yankton Sioux Reservation being a checkerboard reservation.

III. CONCLUSION

Based upon the discussion above, the Court finds all the trust land and Indian-owned fee land that has continuously been held in Indian hands, which is within the original 1858 treaty boundaries of the Yankton Sioux Reservation, is Indian country under

18 U.S.C. § 1151(a). If any of the trust land is found by a superior court to not be "reservation" land, and thus not Indian country under 18 U.S.C. § 1151(a), such trust land qualifies as Indian country under 18 U.S.C. § 1151(b), as a dependent Indian community. Although it would be preferable for law enforcement and administrative purposes to have one line surrounding a wholly contiguous reservation, it appears from Charles Mix County State's Attorney Scott Podhradsky's testimony at trial that the federal, state, county and city law enforcement officers working on the Yankton Sioux Reservation have established a workable system regarding the exercise of criminal jurisdiction. Even if the Yankton Sioux Reservation as now diminished presented law enforcement problems, those problems would have to be countenanced for the Reservation as diminished is what varying federal Indian policies have created. Thus, while the checkerboard reservation is not the ideal result from the various points of view of any of the parties, the exercise of checkerboard federal criminal jurisdiction on the Yankton Sioux Reservation is a workable law enforcement environment. The busy criminal docket before this Court from the Yankton Sioux Reservation confirms that observation. Aside from those observations, the Indians are entitled by law to their reservation, diminished as it is. Accordingly,

IT IS ORDERED:

1. That a Declaratory Judgment will be entered in favor of the Plaintiffs and Plaintiff-Intervenor declaring that the following

categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):

a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;

b) land allotted to individual Indians that remains held in trust;

c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and

d) Indian owned fee land that has continuously been held in Indian hands.

2. That, other than the declaratory relief granted in paragraph 1 above, all of Plaintiffs', Plaintiff-Intervenor's and Defendants' claims asserted in this action as to the boundaries of the Yankton Sioux Reservation are denied.

JUDGMENT

In accordance with the Memorandum Opinion and Order filed this date with the Clerk,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of the Plaintiffs and the Plaintiff-Intervenor to the extent that the

Court declares the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):

a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;

b) land allotted to individual Indians that remains held in trust;

c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and

d) Indian owned fee land that has continuously been held in Indian hands.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, with the exception of the declaratory relief granted immediately above, all of Plaintiffs', Plaintiff-Intervenor's and Defendants' claims asserted in this action as to the boundaries of the Yankton Sioux Reservation are denied.

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599 N.W.2d 364

Supreme Court of South Dakota.
James BRUGUIER, Petitioner and Appellant,
v.
Joseph CLASS, Warden, South Dakota State Penitentiary, Appellee.
No. 20216.

Argued Jan. 13, 1999.
Decided Sept. 1, 1999.
Rehearing Denied Oct. 7, 1999.

John M. Wilka of Wilka, Haugen & Kirby, P.C., Sioux Falls, for petitioner and appellant.

Mark Barnett, Attorney General, John P. Guhin, Deputy Attorney General, Pierre, for appellee.

KONENKAMP, Justice.

[¶ 1.] In this appeal, we must again decide the status of certain lands lying within the 1858 boundaries of the Yankton Sioux Reservation. By habeas corpus petition, James Bruguier challenges state jurisdiction in Pickstown, the place of his criminal offense. The United States Supreme Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) [*Yankton Sioux Tribe*], held that *unallotted* lands ceded to the United States were subject to state jurisdiction. Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership. We conclude that this territory is not Indian country as defined by federal law, and therefore South Dakota properly

maintains jurisdiction. We affirm the decision denying Bruguier's habeas petition.

A

[¶ 2.] A jury found James Bruguier guilty of first degree burglary on August 21, 1992. He later pleaded guilty to being a habitual offender. On appeal, we affirmed. *State v. Bruguier*, 510 N.W.2d 126 (S.D.1993). He committed the burglary in Pickstown, South Dakota, which lies within the original 1858 boundaries of the Yankton Sioux Indian Reservation. His first petition for writ of habeas corpus was denied, but based on the U.S. District Court's decision in *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D.1995), concluding that the 1858 Reservation remained intact, Bruguier filed a second petition. The circuit court also denied that petition, based on our decision in *State v. Greger*, 1997 SD 14, 559 N.W.2d 854. While his appeal to this Court was pending, the United States Supreme Court decided *Yankton Sioux Tribe*, 522 U.S. at 329, 118 S.Ct. at 789. We then remanded his case for a decision on whether the burglary occurred on land retaining reservation or Indian country status under 18 USC § 1151.

[¶ 3.] The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished, but left to the habeas judge to decide whether the land remained Indian country under federal law. The court found that the place

where the offense was committed lies on formerly allotted land, "the Indian title to which has been long extinguished [and] is now held in fee title by non-Indians."[1] Also, the court concluded the reservation had been disestablished and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151; therefore, the offense did not occur in Indian country and state jurisdiction was proper. Bruguier's petition for writ of habeas corpus was denied. On the same day the circuit court signed its findings, the U.S. District Court ruled that the 1858 boundaries remain intact, thus by inference making Pickstown Indian country. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D.1998) [*Gaffey* I]. Bruguier now appeals.[2] Jurisdiction may be properly challenged through a habeas petition. *Flute v. Class*, 1997 SD 10, ¶ 8, 559 N.W.2d 554, 556 (citing *Weiker v. Solem*, 515 N.W.2d 827, 830 (S.D.1994)).

B

[¶ 4.] The legal history of the Yankton Sioux Reservation is described in *Yankton Sioux Tribe*, 522 U.S. at 329, 118 S.Ct. at 789, and *Greger*, 1997 SD 14,

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[1] See the shaded Pickstown map in the *Gaffey* Joint Appendix, Volume V, at 1379, Briefs from *Yankton Sioux Tribe, et al v. Gaffey, et al* (8thCir.1999).

[2] In this instance, our review of the circuit court's decision is de novo as we are deciding "whether the established facts fall within the relevant legal definition." *Falls v. Nesbitt*, 966 F.2d 375, 377 (8thCir.1992).

559 N.W.2d at 854. We address only those particulars bearing on the present question. The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. *Greger*, 1997 SD 14, ¶ 3, 559 N.W.2d at 857. With the passage of the General Allotment (Dawes) Act in 1887, the Yankton Reservation was to be partitioned with parcels to be assigned to individual tribal members.[3] In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894. *Id.* ¶¶ 1, 4. By this agreement, for a "sum certain," the Tribe "ceded, sold, relinquished and conveyed" all its unallotted reservation lands to the United States. *Id.* ¶ 1.

[¶ 5.] After President Cleveland's proclamation opened the unallotted lands for settlement in 1895, the area filled with settlers. The history is recounted in the writings of author and journalist, Adeline S. Gnirk.[4] In her retelling, the Chicago, Milwaukee & St. Paul Railroad secured a right-of-way in 1897 to extend its line through the opened reservation from Napa to the place where the town of Platte was later

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[3] Professor Herbert Hoover points out that certain lots were earlier assigned or distributed to Yankton "families." In 1869, 177 80-acre lots were surveyed and in 1874, additional 40-acre lots were surveyed. The General Allotment Act invalidated all the "family" assignments and provided for "individual" allotments. Herbert Hoover, A Yankton Sioux Tribal Land History 5 (1995).

[4] A. Gnirk, The Epic of the Realm of Ree (1984); A. Gnirk, The Epic of the Great Exodus (1985); A. Gnirk, The Epic of Papineau's Domain (1986).

founded. The railbed was completed in 1900. Within a year four townsites originated along the railway: Wagner, Lake Andes, Geddes and Platte. Dante and Ravinia were soon added as railroad stops. The region was transformed. Typical perhaps is the rise of Lake Andes, which was platted in 1901 and formally established as a town in 1904.

> When inherited Indian lands commenced to be sold, a location was secured on Section 4, the present site. This land including the 80 acres then platted and the 120 acres adjoining had been allotted to John Arthur, or Sparrow Hawk. He died and in 1904 his only heirs, his wife Taniyawakanwin, and daughter Bessie Zitka Koyewin were induced to sell 80 acres of this land to the Lake Andes Townsite Company.

Gnirk, Papineau's Domain, *supra* note 4, at 143, *cited in Gaffey* Joint Appendix, at 765. Even during the twenty-five year trust period required by the Dawes Act, Article XI of the 1894 Act allowed for the sale of allotted lands on the death of certain allottees. By 1916, Lake Andes won a decade-long battle with the other railroad towns to become the county seat, replacing Wheeler. Construction on the new courthouse began in 1917. The town remains the county seat to this day. Its courthouse and law enforcement center both sit on formerly allotted land.

[¶ 6.] For the Yanktons, too, life changed dramatically.

> Immediately after initial allotment proceedings ended in 1894, agency officials divided

> the reservation into two farm jurisdictions to hasten the adjustment of adults. . . . [They were taught] techniques of using horse-drawn machinery, selective livestock breeding, dry farming on arid land, and maintaining agricultural equipment.

Herbert T. Hoover & Leonard R. Bruguier, The Yankton Sioux 46 (1988). Tribal government quickly faded and became nonexistent. Indeed, the agency Superintendent in 1903 "declared that tribal government by chiefs was a thing of the past." *Id.* at 53. Even the tribal business committee disappeared, until revived years later. *Id.* The Court of Indian Offenses, which dealt with crimes by Indians against Indians on allotted land, was abolished in 1909. As the habeas court found, "[o]f the approximately 260,000 acres originally allotted to Indians, by 1913, just twenty-one years later, the tribal members held only 70,000 acres. . . . They had thus divested themselves of over 190,000 acres. By 1930, tribal members owned only 43,358 acres." The federally supported agency boarding school closed in 1919 and its students transferred to county public schools. Yanktons were added to the county jury list and several were elected or appointed to county and local offices, including clerk of courts, constable, election judge and clerk.

[¶ 7.] The present character of the area reflects the turn of the century changes that followed the reservation opening. From the 262,000 acres originally allotted, only about fifteen percent remain in Indian hands. "Today, the total Indian holdings in the region

consist of approximately 30,000 acres of allotted land and 6,000 acres of tribal land." *Yankton Sioux Tribe,* 522 U.S. at 339, 118 S.Ct. at 796 (citing Indian Reservations: A State and Federal Handbook 260 (1986)).

C

[¶ 8.] Bruguier committed burglary at a home in the state-chartered municipality of Pickstown. Although a substantial portion of the site on which Pickstown rests is former allotment land, none of it is now held by the Tribe or in trust. Pickstown has its own unique origin. Named for General Lewis A. Pick of the Corps of Engineers, the town was established in 1946. The U.S. Army Corps of Engineers created it as part of the Fort Randall Dam project to accommodate workers and their families. *See generally* Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 USC § 460d (1976)).[5] To permit building hydroelectric and flood control dams on the Missouri River, supporting enactments authorized the taking of portions of certain Indian reservations, including the nearby Crow Creek Sioux and Lower Brule Reservations.[6] In

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[5] Also known as the Pick-Sloan Missouri River Basin program.

[6] *See* Act of October 3, 1962, Payment for Lands of Crow Creek Sioux Reservation, Pub. L No. 87-735, 76 Stat. 704; Act of October 3, 1962, Payment for Lands of Lower Brule Sioux Reservation, Pub. L. No. 87-734, 76 Stat. 698; Act of September 2, 1958, Payment for Lands to Lower Brule Sioux Tribe, Pub. L. No 85-923, 72 Stat. 1773; Act of September 2, 1958, Payment for

(Continued on following page)

those enactments the text mentions taking "reservation" land. In contrast, the body of the eminent domain statute dealing with the Yankton Sioux refers to taking only "tribal and allotted lands," but the title in the original enactment (Pub. L. No. 83-478) does refer to the Yankton Sioux Reservation.[7] *See* 43 USC § 1200e (68 Stat. 453 (1954)) (authorizing expenditure to relocate tribal members "who reside or have resided, on tribal and allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project"). This latter law also provided that "title to any lands acquired within Indian country pursuant to this section shall be taken in the name of the United States in trust for the Yankton Sioux Tribe or members thereof."

[¶ 9.] In 1957, by authority of the Federal Property and Administrative Services Act of 1949, Pub. L. No. 63-152, 63 Stat. 378, allowing disposal of surplus federal property to stimulate industrial development, Pickstown was designated by Congress

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Lands to Crow Creek Sioux Indians, Pub L No 85-916, 72 Stat. 1766; Act of September 2, 1958, Oahe Dam and Reservoir Project, Pub. L. No. 85-915, 72 Stat 1762 (Standing Rock Sioux Tribe), Act of September 3, 1954, Pub L No 83-776, 68 Stat. 1191 (Oahe Dam-Cheyenne River Tribe); Act of October 29, 1949, Pub L. No. 81-437, 63 Stat 1026 (Garrison Dam-Fort Berthold Tribe)

[7] The title to this Act refers to the "Yankton Sioux Indian Reservation." Yet within the body of this enactment only Lower Brule and Crow Creek are referred to as reservations. Whereas, the body of this law refers to Yankton "tribal and allotted lands."

as an area eligible, upon Indian request, for transfer without cost to an Indian tribe or other Indian entity. *See* 25 USC 463(d) (1997). Apparently, no transfer took place. In 1985, Congress relinquished this land to the municipal corporation serving the people of Pickstown.

> TRANSFER OF FEDERAL TOWNSITES
>
> (a)(1) Except as otherwise provided in this Act and notwithstanding any other provision of law, the Secretary of the Army shall transfer, without consideration and without warranty of any kind, all rights, title, and interests of the United States in each of the following described lands (including all improvements on such lands) to the municipal corporation serving the inhabitants of such land as soon as possible after the incorporation of such municipal corporation:
>
> * * *
>
> (B) The land referred to as Pickstown, South Dakota, consisting of 393 acres, more or less. . . . .

Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, ch. VI, 99 Stat. 293, 317. This law was later amended "by striking out 'without warranty of any kind' and inserting in lieu thereof 'by warranty deed, said deed to include a covenant to defend title to the

property.'" Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4242.[8]

[¶ 10.] We appreciate, of course, that a federally authorized townsite may still be Indian country if it exists within the boundaries of an Indian reservation, even after title has been transferred in fee to non-Indians. *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 358-59, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). In addition, reservation land taken by eminent domain will not necessarily extinguish reservation boundaries. *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809 (8th Cir.1983). Yet, when read together, these enactments appear incompatible with any conception of this region as part of an existing Indian reservation. No reference is made to taking "reservation" land from the Yankton Sioux in the various flood control takings statutes. And Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members, for it was not returned to them, but to the municipal corporation.

[¶ 11.] Nonetheless, the Federal Government has been inconsistent in its references to the Yankton

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[8] The amendment also conveyed an additional twenty-three acres of land used by Pickstown as a sanitary landfill The Corps of Engineers retained a 9-acre tract where maintenance buildings and an office building are located The office building houses the town's Post Office and Credit Union under lease Also retained was a cold storage warehouse and immediate land located on a 16-acre tract

Reservation over the past century. We think it prudent, therefore, to analyze the question further under traditional Indian law standards established by the Supreme Court. *See Yankton Sioux Tribe,* 522 U.S. at 354, 118 S.Ct. at 803 ("Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner.").

D

[¶ 12.] "Interpretation of federal law is the proprietary concern of state, as well as federal, courts." *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 275, 117 S.Ct. 2028, 2037, 138 L.Ed.2d 438 (1997). Indeed, the jurisdictional issue here is as vital to South Dakota as it is to the Yankton Sioux Tribe and the Federal Government; thus, it is proper for this Court to determine where state jurisdiction lies.[9] Whether land falls within a reservation or constitutes Indian country "depends upon the interpretation and application of federal law." *Seymour,* 368 U.S. at 353, 82 S.Ct. at 426.

[O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of

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[9] For this reason, we have received and reviewed all the briefs and exhibits submitted to the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Gaffey.* The status of approximately 222,000 acres of formerly "allotted" land now owned by non-Indians in southern Charles Mix County is open to uncertainty.

land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984) (citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94-95, 54 L.Ed. 195 (1909)); *see also Yankton Sioux Tribe*, 522 U.S. at 343, 118 S.Ct. at 798 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation."); *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092-93, 43 L.Ed.2d 300 (1975) (after a reservation has been created "all tracts included within it remain a part of the reservation until separated therefrom by Congress"); Monroe Price & Robert Clinton, Law and the American Indian 96 (2d ed. 1973) ("Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership.").

[¶ 13.] Congressional intent to terminate a reservation is not "lightly found" and ambiguities are to be resolved against it. *Hagen v. Utah*, 510 U.S. 399, 411, 114 S.Ct. 958, 965, 127 L.Ed.2d 252 (1994) (citations omitted); *see also DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1092-93. Intent to remove land from reservation status must be clearly manifested. *DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1093. Without

unambiguous intent, the general rule that "doubtful expressions" are construed in a light most favorable to the Indians, applies to our review of statutory and treaty language. *Id.*

E

[¶ 14.] The Federal Government generally has jurisdiction over Indian country, along with the Indian Tribe inhabiting it. *Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 527 n. 1, 118 S.Ct. 948, 952 n. 1, 140 L.Ed.2d 30 (1998) [*Venetie*]. Bruguier contends that whatever their present ownership, all originally allotted lands maintain Indian country status under 18 USC § 1151(a), as they lie within the 1858 boundaries of the Yankton Sioux Indian Reservation.[10] He believes that nothing in the negotiations, the treaty, or the later development in the territory suggests that sales of *allotted* land to non-Indians would diminish the reservation beyond what the sale of the *unallotted* land accomplished. On the other hand, the State argues, based on *Greger,* that the reservation was disestablished by the 1894 Act, leaving as Indian country only Indian retained allotments and tribally owned land.[11]

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[10] This was essentially the U.S. District Court's decision in *Gaffey,* 14 F.Supp 2d at 1135.

[11] As we were only dealing with the question whether the sale of all unallotted lands shrunk the boundaries of the reservation, *Greger* found the reservation had been *diminished,* rather than *disestablished*

[¶ 15.] Our task is to decide whether Pickstown is Indian country. More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c).[12] Three categories of land qualify as Indian country under 18 USC § 1151. First, § 1151(a) includes as Indian country those lands within the boundaries of a reservation under United States Government jurisdiction. Second, § 1151(b) defines Indian country as "all dependent Indian communities" within the United States. We need not address this subsection as no one in this appeal contends the Pickstown site or any other place on similarly non-retained allotment land is a "dependent Indian community." Third, § 1151(c) includes as

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[12] 18 USC § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian country all Indian allotments that have not lost their Indian titles.[13]

[¶ 16.] In *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959), we interpreted 18 USC § 1151 to mean that subsection (a) encompasses those areas within a reservation, and that subsection (c) applies to those lands standing outside reservation boundaries.

> If subsection (a) is to receive a literal interpretation a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title would not remove such a tract from Indian country, but

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[13] 18 USC § 1151 was enacted in 1948. The Reviser's Note to the statute indicates that the definition of Indian country was derived from "the latest construction of the term by the United States Supreme Court." 18 USC § 1151 reviser's note. Congress used language from *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), and *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). In *Pelican*, the Court decided whether an Indian allotment that was once part of the Colville Indian Reservation but was situated in a part of the reservation that had been opened to settlement by Congress was Indian country. 232 U.S. at 444-45, 34 S.Ct. at 397. The Colville Indian Reservation was included in the definition of Indian country, as it had "been segregated from the public domain." *Id.* at 445, 34 S.Ct. at 397. The Court concluded that because the land was an allotment held in trust for an individual Indian, the federal government still retained criminal jurisdiction over this land, even though the land lay in the diminished part of the reservation. *Id.* at 447, 34 S.Ct. at 398.

> under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory.

Hollow Horn Bear, 95 N.W.2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the Yankton Sioux Reservation may be considered congressionally terminated.

F

[¶ 17.] In *Yankton Sioux Tribe*, the Supreme Court ruled that "Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts no longer constitute Indian country, and thus . . . the State has primary jurisdiction over . . . lands ceded under the Act." 522 U.S. at 358, 118 S.Ct. at 805. The Court limited its holding to deciding only that the "unallotted, ceded lands were *severed* from the reservation[.]" *Id.* (emphasis added). Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary, as in the 1858 Treaty. In most instances, when a reservation is diminished, its boundaries "shrink." *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. Indeed, the Supreme Court in *Yankton*

Sioux Tribe found that the 1894 Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." 522 U.S. at 345, 118 S.Ct. at 799.

[¶ 18.] Even with the 1858 boundaries extinct, however, we still must return to the Supreme Court's traditional three-factor "analytical structure" to decide the status of the lands left unresolved in *Yankton Sioux Tribe. Hagen,* 510 U.S. at 411, 114 S.Ct. at 965.

> The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. Finally, "[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation."

Id. (internal citations omitted) (quoting *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166-67). *Yankton Sioux Tribe* and *Greger* scrutinized these three factors. We need not repeat all their conclusions here. Instead, we will touch on those points deemed more ambiguous.

1. Statutory Language

[¶ 19.] Articles I and II of the 1894 Act provided that the Yankton Tribe did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" and that in consideration for the "lands ceded, sold, relinquished, and conveyed" the United States agreed to pay a sum certain of $600,000. *Yankton Sioux Tribe,* 522 U.S. at 344, 118 S.Ct. at 798; *Greger,* 1997 SD 14, ¶ 4, 559 N.W.2d at 858. Equivalent language signaled termination of the reservation in *DeCoteau,* where the Supreme Court noted that such terminology was "precisely suited" to such purpose. 420 U.S. at 445, 95 S.Ct. at 1093. Being the most probative evidence, this cession language manifests an almost irrebuttable presumption of congressional intent. *Greger,* 1997 SD 14, ¶ 1, 559 N.W.2d at 855-56. Yet, other clauses in the Act are less absolute. Are these so uncertain as to negate the nearly conclusive import of the cession language? To appreciate the idiom of the 1894 Act, it is first important to understand the genesis of the allotment system and the legal notion of Indian ownership of reservations at that time.

[¶ 20.] Many well-meaning reformers, legislators, and federal officials viewed reservations as interim solutions to eventual Native American assimilation. When compressed, they theorized, Indian "detribalization" and "Americanization" would take

place.[14] Reservations, therefore, were expected to have a limited life span. Arrell Morgan Gibson, The American Indian, Prehistory to the Present, 452, 486, 489, 491 (DCHeath & Co 1980). The Dawes Act had the dual goal of hastening the "detribalizing" process and opening reservation land to "homeseekers." *Id.* at 494-95, 498, 506. *See also Solem*, 465 U.S. at 468, 104 S.Ct. at 1165 (surplus land acts anticipated imminent demise of reservations and were enacted partly to facilitate the process). It would end common ownership by tribes, as well as the tribal way of life.

Under the practice of allotting lands in severalty to individual Indians, title to the allotted land was held in trust by the Government for the benefit of the allottee, or vested in the allottee subject to a restraint

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[14] As one historian expressed:

> For more than one-half century, sincere friends of the Indians had been advocating the individual ownership of land as the salvation of any Indian who would accept it. Like other mistaken policies it was all part of the centuries-old aim of changing Indians into white people Break up their natural grouping, whether by abolishing the government of advanced tribes or undermining the influence of primitive chiefs, and set each family alone on a farm to develop habits of industry and the pride of possession. . . . The Indians' friends also argued that only a fee simple title would protect their land from the insecurity of reservation and treaty guarantees.

Angie Debo, A History of the Indians of the United States 299 (UOkPress 1970)

against alienation. Obviously, in either case tribal title is not involved.

Felix Cohen, Handbook of Federal Indian Law 7-8 (1st ed. reprint 1986). The allotment system later proved a dreadful failure, but at the time it was assumed that, for the benefit of assimilation and civilization, Indian and non-Indian families would intersperse over the opened reservations, making tribal existence and governance obsolete. *Solem,* 465 U.S. at 468, 104 S.Ct. at 1165. These philosophic assumptions emerge in the negotiations between Government representatives and Yankton Tribe members, where both sides spoke of tribal life as soon to be outdated. *Yankton Sioux Tribe,* 522 U.S. at 353, 118 S.Ct. at 803 (citing Report of the Yankton Indian Commission (Mar. 31, 1893), at 19, *reprinted in* S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 9-11 (1894); S Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)).

[¶ 21.] The Government's notion of Indian ownership and how it legally ended can be seen in congressional enactments and early Supreme Court decisions. In 1834, Congress statutorily defined Indian country. It upheld the communal objective of tribal communities with the understanding that once title to Indian land was extinguished, the land was no longer in Indian ownership.

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not

> within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be Indian country.

Act of June 30, 1834, Pub. L. No. 23-161, 4 Stat. 729. When the U.S.Code was revised, however, this section was not included, effectively repealing it. Cohen, *supra,* at 6. The definition, nevertheless, shows that even in early usage of the term Indian country, Congress intended it to include only those lands to which Indian title had not been extinguished.

[¶ 22.] After repeal of 1834 definition of Indian country, the Supreme Court in *Bates v. Clark,* 95 U.S.(5 Otto) 204, 24 L.Ed. 471 (1877), defined the term:

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Id. at 208; *see* Cohen, *supra,* at 7 (explaining the origin of the definition of Indian country). *See generally Perrin v. United States,* 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914). In *Greger,* we observed that "*Perrin*'s notion of Indian country was consistent with

the view at the time that reservations included 'only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.'" 1997 SD 14, ¶ 8, 559 N.W.2d at 860 (quoting *Solem,* 465 U.S. at 468, 104 S.Ct. at 1165). In sum, Indian title in common, or put another way, tribal title, ended when tribal ownership ended. *Yankton Sioux Tribe,* 522 U.S. at 346, 118 S.Ct. at 798, (citing *Solem,* 465 U.S. at 468, 104 S.Ct. at 1164) (tribal ownership coextensive Indian ownership).

[¶ 23.] Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved even for tribal purposes.[15] By eliminating tribal ownership, the "common understanding of the time" was that a "critical component of reservation status" was lost. *Yankton Sioux Tribe,* 522 U.S. at 346, 118 S.Ct. at 799. Individual Indians received their allotments and, except for agency and school land, all the rest was sold and opened for homesteads and townsites. It was not until the following century that Indian ownership and tribal ownership were legally distinguished in identifying Indian country.

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[15] It was decades after the reservation was opened that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub. L No 70-729, 45 Stat. 1167 (returning to Tribe 1000 acres titled in United States that had been reserved in the 1894 Act for "agency, school, and other purposes").

By then, of course, more tolerant and enlightened notions of preserving aboriginal self-determination and culture gained ascendancy. Congressional enactments suitably followed. Congress has "plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *Id.* at 343, 118 S.Ct. at 798 (citations omitted); *see also Sandoval,* 231 U.S. at 46, 34 S.Ct. at 5-6 ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease."). With this background in mind, we examine a few of the purportedly discrepant provisions in the 1894 Act.

[¶ 24.] The Supreme Court in *Yankton Sioux Tribe* expressed some misgivings on the import of certain language in Article VIII.

> Although we agree with the State that the school sections clause reinforces the view that Congress intended to extinguish the reservation status of the unallotted land, a somewhat contradictory provision counsels against finding the reservation terminated. Article [VIII] of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." In *Solem,* the Court noted with respect to virtually identical language that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." 465 U.S. at 474, 104 S.Ct. at 1168.

Yankton Sioux Tribe, 522 U.S. at 350, 118 S.Ct. at 801. Reserving to the United States lands for agency, school and other purposes suggests continued Government support for tribal members, and possibly evinces the notion of a continuing reservation. Yet, the uncertainty of this provision cannot carry the significance it did in *Solem.* There, the critical cession language was not suited to finding intent to terminate the reservation.

[¶ 25.] In keeping with the Dawes Act's twenty-five year trust period following the allotting process, setting aside government land for school and agency purposes was common, even for a terminated reservation.[16] In the 1891 treaty with the Sisseton-Whapeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau,* 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school building are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v. Kneip,* 430

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[16] After the opening, federal officials provided assistance to help the Yanktons' transition into agriculturists. *See* Hoover & Bruguier, *supra,* at 46.

U.S. 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977)(Marshall, J., dissenting).

[¶ 26.] Another provision that bears further scrutiny is Article XIV of the 1894 Act:

> All allotments of land in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and *Congress shall never pass any act alienating any part of these allotted lands from the Indians.*

(emphasis added). This, too, is consistent with the initial twenty-five year trust relationship. At the time of negotiations, much of the land to be allotted had yet to be processed. Though opposed to partitioning their land when the Dawes Act first passed, Yankton tribal members expressed concern during the 1892 negotiations with the slowness of the approval process. A history of broken promises and failures to deliver timely, adequate provisions as part of the 1858 Treaty created understandable Yankton skepticism about whether all the allotments would be distributed. Taken in context, this provision simply assured that those entitled to allotted parcels would receive them as soon as possible, and once received, they would not be taken away. Nothing in this provision can be interpreted as precluding individual Indian owners from later transferring their property to non-Indians after the trust period expired.

[¶ 27.] Even if the more uncertain provisions of the 1894 Act cannot be wholly explained, congressional intent to end the Yankton Reservation is sufficiently clear in its "precisely suited" cession language. As the Supreme Court noted with respect to the Article XVIII saving clause, "'it is a commonplace of statutory construction that the specific' cession and sum certain language in Articles I and II 'governs the general' terms. . . ." *Yankton Sioux Tribe*, 522 U.S. at 348, 118 S.Ct. at 800 (citation omitted).

2. Historical Context

[¶ 28.] Although there are inconsistencies in this sphere also, we find little in the historical context or the Treaty negotiations to suggest that the reservation would continue. "[T]he record of the negotiations between the Commissioners and the Yankton Tribe contains no discussion of the preservation of the 1858 boundaries. . . ." *Id.* at 347, 118 S.Ct. at 800.

> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation. They observed that "now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." And, in a March, 1894, letter to the Chairman of the Senate Committee on Indian Affairs, several Yankton chiefs and

> members of the Tribe indicated that they concurred in such an interpretation of the agreement's impact. The letter urged congressional ratification of the agreement, explaining that the signatories "want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation . . . as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization."

Id. at 353, 118 S.Ct. at 802-03 (internal and other citation omitted). Implicit in the negotiations was an opened area without boundaries; explicit was an end to tribal existence upon the distribution of allotments and the sale of unallotted lands. Without tribal existence, without communal land, the historical context points to an understanding that the reservation would no longer continue to exist. As the Supreme Court wrote in *Yankton Sioux Tribe,* "[i]n this case, although the context of the Act is not so compelling that, standing alone, it would indicate diminishment, neither does it rebut the 'almost insurmountable presumption' that arises from the statute's plain terms." 522 U.S. at 351, 118 S.Ct. at 802 (citation omitted).

3. Resultant Developments in the Area

[¶ 29.] We recognize that a "surge in non-Indian settlement" is the "least compelling" proof in our

examination of this question. *Id.* at 356, 118 S.Ct. at 804. It was congressional intent in passing the 1894 Act that primarily controls the analysis and not the later movements of settlers and others. Yet we cannot ignore the palpable reality that, as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed.

[¶ 30.] Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. Later actions may elucidate what Congress expected and here "the area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and those demographics signify a diminished reservation." *Id.* at 356-57, 118 S.Ct. at 804 (quoting *Solem*, 465 U.S. at 471 n. 12, 104 S.Ct. at 1167 n. 12).

[¶ 31.] With the opening of the reservation came law and order administered by the State, with few

exceptic ,s.[17] No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single most salient fact [relating to later jurisdictional history] is the unquestioned actual assumption of state jurisdiction. . . ." *Rosebud Sioux Tribe*, 430 U.S. at 603, 97 S.Ct. at 1371. In *Yankton Sioux Tribe*, the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." 522 U.S. at 357, 118 S.Ct. at 804. The only areas still treated as Indian country were the allotted lands, which remained under Indian ownership. Later, when the Tribe acquired certain lands, they were also considered out of the State's jurisdiction.

[¶ 32.] In the century following the opening of the reservation, the Yanktons themselves referred to their common land or "reservation" as a "mile square." *Greger*, 1997 SD 14, ¶ 5, 559 N.W.2d at 859. At the time of the 1894 Act, this "reservation" was federal agency land, as reserved in Article VIII, not tribal or common land. Even more significantly, both the 1932 Yankton Tribal Constitution and the amended Constitution of 1962 defined the Tribe's property as including only those tribal lands currently owned

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[17] Those exceptions have to do with tribal police and federal officials dealing with matters on trust lands, which, as we know, quickly dwindled

by the Tribe. Not until 1990 was the Yankton Constitution amended to encompass all lands and waters within the 1858 Treaty boundaries. This belated reclamation cannot overcome a century of development and reliance at odds with it, much less the congressional intent in the 1894 Act.

[¶ 33.] We see little evidence to depart from our previous conclusion on this point in *Greger*.

> Today, less than ten percent of the land within the 1858 Treaty boundaries is trust land. Over 600 miles of road in the area are maintained by county and township authorities. Only 22 miles are maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia, and Marty all lie within the former boundaries. Non-Indians comprise over two-thirds of the population in the area.
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> * * *
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> [I]f we accept defendant's arguments, over 6000 citizens of Charles Mix County would presently find they have become residents of an Indian reservation. This region has not been considered a reservation by the general populace.

Greger, 1997 SD 14, ¶¶ 29, 30, 559 N.W.2d at 867. Dante, Lake Andes and Ravinia are on former allotments. Pickstown and Wagner are partly situated on former allotments. The Charles Mix County seat (the

courthouse and law enforcement center) are located on former allotment land.

[¶ 34.] Our Court has repeatedly held that South Dakota has jurisdiction over both ceded unallotted land and allotted parcels no longer titled in Indian ownership. In *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964), we discerned a congressional purpose "to disestablish the reservation and restore to the public domain the lands therein with the exception of allotments in severalty." Thus we concluded that an offense at Lake Andes was not committed within Indian country. In *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973), we held that "the Act of 1894 disestablished that portion of the Yankton Reservation which was ceded and sold to the United States," including the cities of Lake Andes and Wagner. *Cf. State v. Winckler*, 260 N.W.2d 356, 360 (S.D.1977) (Yankton Sioux Tribe Pork Plant at Wagner is trust land, thus, Indian country).

[¶ 35.] A conclusion that, despite present ownership, all originally allotted land is part of a reservation creates new federal, tribal and state jurisdictional lines within Charles Mix County and its communities that not only affect law enforcement matters, but innumerable other issues both momentous and mundane: taxation, licensing, voting, economic development, environmental protection. To turn back now, to hold that the reservation was not terminated when for so many years that has been legal conception of both Indians and non-Indians, would create a jurisdictional maze, and defeat "the

justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421, 114 S.Ct. at 970.

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[¶ 36.] Paralleling the Act of 1894 under consideration here is the 1891 Act terminating the Lake Traverse Indian Reservation as decided in *DeCoteau. Yankton Sioux Tribe*, 522 U.S. at 344-45, 118 S.Ct. at 798. It is difficult to find any jural distinction between the two reservation sales. Even in 1892, the negotiators for the Yankton agreement repeatedly referred back to the Sisseton-Whapeton agreement, expressing their intent to effect the same result. In the end, pursuant to the General Allotment Act, both reservations were, in the same time frame, parceled to individual Indians, and all unallotted lands were sold to the United States. Both Acts used the same cession language: "cede, sell, relinquish and convey. . . ." The intent behind this language is unmistakably the same.

[¶ 37.] Like the 1891 Act, "[t]he 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation." *Yankton Sioux Tribe*, 522 U.S. at 357, 118 S.Ct. at 805; *see DeCoteau*, 420 U.S. at 445-46, 95 S.Ct. at 1093-94. In each instance, *all* unallotted lands were sold. With both treaties, the heart of the preamble language recited intent "to dispose of a portion of the land set aside and reserved" to them.

On both reservations, the opened lands were subject to the homestead and townsite laws of the United States. In both cases, the United States retained an agency and schools. Most significantly, no land in common was retained, no boundaries were redefined, and the parcels allotted to Indians were in both instances spread randomly across the former reservations. *Yankton Sioux Tribe,* 522 U.S. at 334-40, 118 S.Ct. at 793-96; *DeCoteau,* 420 U.S. at 428, 95 S.Ct. at 1085. In both Acts, it was provided that "excepting the sixteenth and thirty-sixth sections . . . shall be reserved for common school purposes, and be subject to the laws of" the State. The proclamations opening the reservations each referred to a "schedule of lands within the . . . reservation. . . ." Upon opening the land for settlement, in both instances South Dakota assumed unchallenged jurisdiction in all areas except on trust lands. *Yankton Sioux Tribe,* 522 U.S. at 357, 118 S.Ct. at 804; *DeCoteau,* 420 U.S. at 442, 95 S.Ct. at 1092. The *DeCoteau* Court perceived these circumstances to signal congressional intent to terminate the reservation and restore the land to the public domain. We believe the same intent is shown in the Yankton Reservation sale.

Conclusion

[¶ 38.] The place in Pickstown where Bruguier committed his crime lies on land within the original 1858 boundaries of the Yankton Sioux Reservation. This area was initially allotted to a member of the Yankton Sioux Indian Tribe, but was later sold in fee

to a non-Indian. Pickstown was created in 1946 as a federal reserve for the U.S. Army Corps of Engineers. Congress later relinquished ownership of this townsite to Pickstown's municipal corporation. It appears that Congress did not consider this area Indian country or an existing Indian reservation. Nonetheless, to comply with Supreme Court jurisprudence in deciding if this area is Indian country, we further considered the matter under the traditional principles the Court instituted.

[¶ 39.] Our analysis requires us to interpret a Nineteenth Century treaty, negotiated, enacted and enforced under outmoded values and discarded beliefs. In *Greger,* we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. Today we proceed further to decide the jurisdictional status of former allotments.

[¶ 40.] We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act. Nor is it trust land, a dependent Indian community, or property held by the Tribe. Consequently, the State properly exercised jurisdiction over Bruguier and the circuit court correctly denied his habeas corpus petition.

[¶ 41.] Affirmed.

[¶ 42.] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

188 F.3d 1010

United States Court of Appeals,
Eighth Circuit.
YANKTON SIOUX TRIBE, and its
individual members, Appellee,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,
v.
Matt GAFFEY, States Attorney of Charles Mix
County; Herman Peters, Member of the Charles Mix,
South Dakota, County Commission; Bruce Bakken,
Member of the Charles Mix, South Dakota, County
Commission; Jack Soulek, Member of the Charles
Mix, South Dakota, County Commission, Appellants,
William Janklow, Governor of South Dakota;
Mark W. Barnett, Attorney General of South Dakota,
Defendants.
Gary Beeson, Landowner; City of Dante;
City of Geddes; City of Lake Andes; City of
Pickstown; City of Platte; City of Ravinia; City of
Wagner; Harvey P. Weisser, doing business as Weisser
Oil Co., Inc ., Individually, Amici on behalf of
Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.;
Philip Lane, Jr.; James Weddell, descendants of
Francois Deloria, Signatory to the Treaty of 1858,
and descendants and relatives of Philip J. Deloria,
Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members,
Appellee,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Intervenor Plaintiff-Appellee,

Matt Gaffey, States Attorney of Charles Mix County; Herman Peters, Member of the Charles Mix, South Dakota, County Commission; Bruce Bakken, Member of the Charles Mix, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix, South Dakota, County Commission, Defendants,
William Janklow, Governor of South Dakota; Mark W. Barnett, Attorney General of South Dakota,
Appellants.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria,
Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,
Appellees,
v.
Southern Missouri Waste Management District, a non-profit Corporation,
Defendant,
v.
State of South Dakota,
Third Party Defendant-Appellant.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.;

Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Amici on Behalf of Appellee.
Yankton Sioux Tribe, and its individual members; Darrell E. Drapeau, individually, a member of the Yankton Sioux Tribe,
Appellees,
v.
Southern Missouri Waste Management District, a non-profit Corporation,
Appellant,
v.
State of South Dakota, Third Party Defendant.
Gary Beeson, Landowner; City of Dante; City of Geddes; City of Lake Andes; City of Pickstown; City of Platte; City of Ravinia; City of Wagner; Harvey P. Weisser, doing business as Weisser Oil Co., Inc ., Individually, Amici on behalf of Appellant,
Vine Deloria, Jr.; Philip S. Deloria; Philip Lane, Sr.; Philip Lane, Jr.; James Weddell, descendants of Francois Deloria, Signatory to the Treaty of 1858, and descendants and relatives of Philip J. Deloria, Amici on Behalf of Appellee.
No. 98-3893, 98-3894, 98-3896, 98-3900.

Submitted June 17, 1999.
Filed Aug. 31, 1999.
Rehearing and Rehearing En Banc Denied Dec. 8, 1999.*

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* Judge Beam and Judge Loken would grant the petitions and Chief Judge Wollman would grant the petitions for rehearing en banc filed by the State of South Dakota, the Southern Waste Management District, and Charles Mix County.

Mart [sic] Barnett, Atty. Gen. of South Dakota, Pierre, SD, Argued (John P. Guhin, Asst. Atty. Gen., Pierre, SD, Tom T. Tobin, Winner, SD, Scott J. Podhradsky, Lake Andes, SD, on the brief), for Appellant.

Rita Allen, Asst. U.S. Atty., Sioux Falls, SD, Argued, for Appellee U.S.

James G. Abourezk, Sioux Falls, SD, Argued, for Yankton Sioux Tribe.

Before RICHARD S. ARNOLD, MAGILL, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Before the court are several appeals from judgments concerning lands once recognized to be part of the Yankton Sioux Reservation. After the Supreme Court decided in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) (*Yankton*), that the reservation had been diminished at the end of the nineteenth century when the Yankton Sioux Tribe (Tribe) ceded land to the United States, that case was remanded for further proceedings.[1] In the district court the case was then consolidated with an action brought by the Tribe to

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[1] *See Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 141 F.3d 798 (8th Cir.1998). Earlier in the history of the case we upheld the district court's previous ruling that the reservation had been neither disestablished nor diminished. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D.1995), *aff'd*, 99 F.3d 1439 (8th Cir.1996), *rev'd*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

challenge state criminal jurisdiction over acts of tribal members on nonceded land within the original reservation boundaries. After an evidentiary hearing, the district court granted declaratory relief to the Tribe, its individual members, and its chairman Darrell Drapeau, and issued permanent injunctions enjoining state officials from exercising criminal jurisdiction over tribal members on "allotted or reserved lands." *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135, 1160 (D.S.D.1998). The district court concluded that the reservation has not been disestablished and still includes all land within the original exterior reservation boundaries that was not ceded to the United States. *See id.* at 1159. The State of South Dakota (State), the Southern Missouri Waste Management District (District), and the individual named state and county officials appeal.[2]

We affirm the conclusion that the reservation was never clearly disestablished, but we reverse the conclusion that the original exterior boundaries of the reservation continue to have effect and that all nonceded lands remain part of the reservation. We also vacate the injunctions issued in the district court and remand the cases for further proceedings consistent with this opinion.

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[2] The named defendants in the declaratory judgment action were Matt Gaffey, States Attorney of Charles Mix County and four members of the Charles Mix, South Dakota, County Commission (collectively "county officials"), as well as William Janklow, Governor of South Dakota and Mark W Barnett, Attorney General of South Dakota (collectively "state officials").

I.

The original boundaries of the Yankton Sioux Reservation were defined in a treaty between the United States and the Yankton Sioux Tribe on April 19, 1858, 11 Stat. 743 (1858 Treaty), to include approximately 400,000 acres in what is now Charles Mix County, South Dakota.[3] The Supreme Court held in *Yankton* that the reservation was diminished by land ceded to the United States under an 1892 agreement, later ratified by Congress in 1894. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314-19 (1894 Act). The specific question before the Court in *Yankton* was whether the Tribe continued to have jurisdiction over a portion of the ceded land on which the District planned to build a landfill. The Court focused its discussion on that issue, holding unanimously that the Yankton Sioux Reservation had been diminished by the 1894 Act, at least to the extent of the tracts

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[3] The reservation was later surveyed and found to comprise 430,405 acres. *See Letter from the Commissioner of Indian Affairs to the Secretary of the Interior* (Dec. 9, 1983), *reprinted in*, S Exec Doc No. 27, 53d Cong., 2d Sess., 1, 5 (1894) (1894 Commissioner Letter). It is estimated that under the Dawes Act, 167,325 acres were allotted and patented, and that an additional 95,000 acres were allotted after passage of the 1891 Act, leaving 168,000 acres of unallotted lands to be ceded through the 1894 Act. *See id.* The figures from the 1894 Commissioner Letter have been used by the parties throughout this litigation. Nevertheless, we note that the Court of Claims found in 1980 that the Yankton Sioux had ceded 201,110 unallotted acres through the 1894 Act. *Yankton Sioux Tribe v. United States*, 224 Ct.Cl. 62, 623 F.2d 159, 184 (1980)

ceded to the United States, and that the State has primary jurisdiction over all ceded lands including the waste site. *See Yankton*, 118 S.Ct. at 805.

A.

The district court held an evidentiary hearing after *Yankton* was remanded and consolidated with the second case, and later ruled that the Yankton Sioux Reservation had not been disestablished and that it had only been diminished to the extent of the ceded lands. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D.1998). The court noted that nothing in the explicit language of the 1892 agreement supports disestablishment, but that several articles support the conclusion that a diminished reservation remains intact. *Id.* at 1149-56. It also referred to the reports of the council meetings with the Tribe, which do not discuss boundary changes or relinquishment of the reservation, but indicate that the 1892 agreement "memorialized only the consent of the Tribe to sell the surplus lands." *Id.* at 1145. The efforts to have the tribal members live close to white settlers were not intended to eliminate the reservation, but to help the Indians adapt to changed conditions. *Id.* at 1146-47. The Indians could have concluded from the representations made by the government negotiators that they would retain independent powers of self government over their lands. *Id.* at 1147. The district court held that the Yankton Sioux Reservation consists of all nonceded land "within the original exterior 1858 treaty boundaries,"

including those parcels now owned by non Indians, as well as Indian owned land and the land reserved from sale in the 1892 agreement for agency, school, and other tribal purposes. *Id.* at 1159. It concluded that primary criminal and civil jurisdiction over these lands belongs to the Tribe and the United States. *Id.* The court then issued declaratory judgments and enjoined state and county officials from exercising criminal law enforcement jurisdiction over tribal members alleged to have committed crimes on reservation land. *Id.* at 1159-60.

The State, the District, and the individual state and county officials appealed from these judgments in four separate appeals which have been consolidated by this court. A motion to expedite the appeals was also granted.[4] The four groups of appellants all

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[4] Several other motions have been filed The County has moved to have the briefs to the Supreme Court lodged with the clerk The Supreme Court briefs were made part of the record in the district court and are available online. The motion is denied since the briefs are already available The Tribe and the United States have moved to strike portions of the District's brief and to strike the amicus briefs of Gary Beeson and the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia, and Wagner (collectively Cities) In addition, the Tribe has moved to strike the amicus brief of Harvey P Weisser All the motions to strike allege that the challenged briefs refer to documents which are not part of the record on appeal and thus violate Fed. R.App. P 10(a). With the exception of the affidavits of Jonelle J. Drapeau and Ed Zylstra, submitted as addenda to the amicus brief of the Cities, the challenged references do not deal for the first time with key factual material about which the opposing parties were unaware The motions to strike portions of the District's brief

(Continued on following page)

present complementary arguments; they will be referred to collectively as "the State" when their arguments do not differ. The United States offers numerous arguments supportive of the Tribe's position; both appellees will be referred to collectively as "the Tribe" except where their arguments diverge. Each side basically argues that it is entitled to win on all issues left open by the Supreme Court in *Yankton*. The contentions between them primarily involve questions of law which we review de novo, although any factual findings are reviewed for clear error. *See* Fed.R.Civ.P. 52(a).

The State asserts that the 1894 Act disestablished the Yankton Sioux Reservation and that the only remaining indian [sic] country within the original boundaries are "Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). It claims that the Supreme Court held in *Yankton* that the reservation boundaries did not remain intact and that it also implied that *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (finding the Lake Traverse Reservation completely disestablished), controls the outcome here. The State interprets the text of the 1894 Act and its legislative history as illustrating the parties' intent to eliminate the reservation, and it

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and portions of the Weisser and Beeson briefs are denied. The motions to strike the Cities' brief are granted only to the extent that they seek to strike the Drapeau and Zylstra affidavits; these affidavits are stricken and have not been considered.

finds further support for this position in the subsequent treatment of the area. It argues that immediately following the 1894 Act the Tribe itself did not hold any land in common, and the State's exercise of jurisdiction over the area has led landowners to develop reasonable expectations that their lands are not Indian country.

The Tribe argues that the district court correctly ruled that all the nonceded land within the original exterior reservation boundaries constitutes the present Yankton Sioux Reservation.[5] The Supreme Court finding of diminishment in *Yankton* does not mean that the reservation boundaries did not continue as before, and it cites in support the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir.1997), *cert. denied*, 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). The Tribe argues that *DeCoteau* does not control because each agreement and treaty with an Indian tribe is unique and must be examined in light of the circumstances surrounding its passage. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, ___, 119 S.Ct. 1187, 1203, 143 L.Ed.2d 270 (1999). It contends that the required clear statement of congressional intent to disestablish the reservation cannot be found in the

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[5] The district court observed that the Tribe's Constitution as amended in 1990 claimed jurisdiction "extending to the original exterior 1858 boundaries." *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp 2d at 1157. *But see Yankton*, 118 S Ct. at 804-05 (quoting the Constitution drafted in 1932 and amended in 1962).

text of the 1894 Act, the legislative history, or the historical circumstances surrounding its passage. It argues instead that these documents show that Congress and the parties who negotiated the agreement intended all the nonceded land to retain its reservation status.

B.

The *Yankton* Court explicitly limited the scope of its holding to the status of the ceded lands. Those "surplus" lands were intended by the 1892 agreement to be sold to white settlers, but a small amount of unallotted land was reserved from sale for use by the federal government. This land was returned to the Tribe in 1929 and remains under its control. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167. The Supreme Court refrained from going beyond what was necessary for it to decide in *Yankton*, and it did not determine issues of current jurisdiction over the nonceded lands which were reserved from sale or were originally allotted to individual tribal members. *See Yankton*, 118 S.Ct. at 805.

Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). The rights of use and occupancy to these lands were initially held in common by the Tribe, and the federal allotment policy sought to advance assimilation of the Indians by

promoting its prevailing concept of individual land ownership. The practice of allotting reservation land began with the 1887 passage of the General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331). Under the Dawes Act individual tribal members received patents for allotments of reservation land in parcels of up to 160 acres, to be held in trust by the federal government for twenty five years. At the end of the trust period the United States would convey the allotment in fee to the individual allottee, who would then be subject to the civil and criminal laws of the State or Territory in which he resided. *Id.* at 389-90. At the time there was increasing pressure for western land for white settlers, and the Dawes Act provided that the Secretary of the Interior could negotiate with an Indian tribe to purchase all unallotted lands. *Id.* The act was thus a two pronged effort to open up lands for white settlement and to encourage assimilation of the Indians. It was considered a critical element in assimilation because the Indian concept of tribal control over land was fundamentally different from the European American concept of individual land ownership. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.).

Approximately three-fifths of the Yankton Sioux Reservation was allotted under the Dawes Act and an act of February 28, 1891, ch. 383, 26 Stat. 794 (amending and extending the Dawes Act). Although the trust period was initially set at twenty five years, it was terminated early for some allotments and

extended for others. At least eighty five percent of the land allotted on the Yankton Sioux Reservation eventually passed out of trust status; most of this land was sold in fee to non Indians. The allotment policy was later repudiated by the passage of the Indian Reorganization Act in 1934, which prohibited further allotment of reservation land and indefinitely extended the trust period for the remaining trust lands. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77). The record is far from crystal clear about the specific lands remaining in trust on the Yankton Sioux Reservation, but it appears such land is interspersed in a checkerboard pattern with ceded lands and lands which have passed out of trust status and are now owned in fee.

The land ceded to the United States under the 1894 Act was subsequently sold to homesteaders, but the lands allotted to individual Indians continued to be held by the United States in trust for them. Many of these parcels soon lost their trust status. The Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349), permitted the government to take certain allotted lands out of trust status before the twenty five year time period expired and to grant the individual Indian allottees unrestricted fee title to the land. In addition, the trust period on lands which had been allotted within a few years of the passage of the Dawes Act in 1887 began to expire in the first part of the twentieth century. At that time it was understood that when an allotment passed out of trust status and

the allottee received the land in fee, he also became subject to the civil and criminal laws of the State, *see* Dawes Act, 24 Stat. at 389-90, and could then sell his land to non Indians if he chose.

As federal policy began shifting away from allotment, the federal government acted to protect the trust status of the remaining allotments which had not yet lost that status. In 1916, an executive order was issued extending the trust period on all but approximately 150 of the parcels still held in trust on the Yankton Sioux Reservation. Exec. Order No. 2363, Apr. 20, 1916. The trust period for these allotments was extended again in 1926 and 1929, Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929, and then indefinitely in 1934 by the Indian Reorganization Act, § 2, ch. 576, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 462). As a result of this history, the majority of residents in many areas of the original Yankton Sioux Reservation are non Indian.[6] *See* U.S. Dept. of Commerce, Census Bureau, 1990

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[6] According to the 1990 Census, the overall area was approximately two-thirds non Indian, and although the tribal presence in the area has been increasing since the Fort Randall Casino was built, *see Yankton*, 118 S Ct. at 804, it appears that non Indians own the bulk of the land within the original reservation boundaries Municipalities such as Lake Andes and Wagner, for example, have non Indian majorities even though they are partially located on lands originally allotted to individual Yankton tribal members The Tribe has apparently recently purchased additional land in the area and has petitioned the United States to take it into trust

Census of Population, General Population Characteristics, South Dakota 29 tbl. 13 (1990 Census).

These appeals concern the undetermined current status of the 262,000 acres originally allotted to tribal members, some of which remain in trust, but the bulk of which have lost their trust status and are owned in fee by non Indians. The Supreme Court explained in *Yankton* that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us . . . to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." *Id.* It answered that question by holding that the ceded lands were severed and the reservation diminished to that extent. *Id.* We are called on now to address questions intentionally left open in *Yankton* – whether the Yankton Sioux Reservation was disestablished, and if not, whether the reservation has been diminished beyond the nonceded lands.

C.

Although the terms "diminished" and "disestablished" have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation. *Compare DeCoteau,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300; *with Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977);

see also Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439, 1443 n. 4 (8th Cir.1996). A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status. *See, e.g., Rosebud Sioux Tribe,* 430 U.S. at 615, 97 S.Ct. 1361. The 168,000 acres by which the reservation was found diminished in *Yankton* are not contiguous, however, and no single boundary line can encompass these lands.

The question here is one of jurisdiction, that is to what extent the Tribe retains jurisdiction over any nonceded land within the original reservation boundaries. Congress clarified tribal jurisdiction by statute in 1948. For the Tribe to have jurisdiction over any land under the current statute it must qualify as Indian country pursuant to 18 U.S.C. § 1151. The statute defines Indian country to include all reservation land (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments "the Indian titles to which have not been extinguished" (§ 1151(c)). If a reservation exists, the Tribe maintains jurisdiction over all land within its limits, § 1151(a),[7] but if there is no

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[7] It is undisputed that there are broad areas over which the Tribe cannot have exclusive jurisdiction regardless of territorial jurisdiction. For example, tribes do not have criminal jurisdiction over non Indians, *see Oliphant v Suquamish Indian Tribe,* 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L Ed.2d 209 (1978), or authority to regulate activities of nonmembers which do not affect tribal welfare and self-government unless the nonmembers have entered into consensual relations with the Tribe, *see*

(Continued on following page)

reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust, § 1151(c); *see also, Alaska v. Native Village of Venetie,* 522 U.S. 520, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998).

The parties agree that the Tribe has jurisdiction over allotted lands still held in trust by the federal government. The State, the District, and the individual state and county officials assert, however, that this jurisdiction falls under § 1151(c) and that no other lands within the original 1858 boundaries have retained their status as Indian country under § 1151(a) because the reservation has been completely disestablished. The Tribe and the United States argue that the district court correctly ruled that the original exterior reservation boundaries retain effect and that all nonceded land within those boundaries constitutes the Yankton Sioux Reservation.

II.

A.

The heart of the matter involves whether Congress intended to disestablish the Yankton Sioux Reservation when on August 15, 1894 it finally ratified the 1892 agreement ceding certain tribal lands to the United States, *see* 28 Stat. at 314-20, or if not,

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Montana v United States, 450 U.S 544, 563-67, 101 S Ct 1245, 67 L.Ed.2d 493 (1981)

whether it intended to diminish the reservation beyond the ceded lands. The 1892 agreement was the product of protracted negotiations between twenty four tribal representatives and the members of the Yankton Indian Commission (the Commissioners) who were appointed to procure the sale of the unallotted lands. The negotiations took place through a series of councils held from October through December of 1892. Although the immediate objective of the negotiations was the purchase of the unallotted lands, the Commissioners viewed this purchase as a step in the larger process of encouraging complete assimilation.

Commissioner Cole outlined the Commission's mission to the tribal representatives at the first council meeting. He explained that "The Great White father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands. . . . He does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. Later in the negotiations, Commissioner Cole also encouraged the Tribe to adapt to western influences. He argued that the Tribe had no choice but to sell the unallotted lands, declaring: "The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement."

Council of the Yankton Indians (Dec. 17, 1892), transcribed in S. Exec. Doc. No. 27, at 81.

The Tribe proved reluctant to accept the offer to purchase its surplus lands. The Commission's reports show its work was made difficult by the Indians' distrust of the federal government and by factional divisions within the Tribe. *See* Report of the Yankton Indian Commission (March 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7-25 (hereinafter Report). Some tribal members favored the sale and focused their energies on obtaining the highest possible price for the land, while others expressed strong opposition to any sale of tribal lands. *See id.* at 8-11. Key issues in the negotiations included the price to be paid for the lands, the payment of money due to individual Indians who had served as scouts for the United States, the continued payment of annuities pursuant to the 1858 Treaty, and the exclusion of alcohol from the ceded area. *See id.* at 12-21. As the Commission reported: "Careful inquiry into the conditions and requirements of these Indians soon revealed to us the fact that the purchase of the surplus land was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands." *Id.* at 17.

In December of 1892, the Commission finally reached an agreement with the Tribe whereby it agreed in Articles I and II to "cede, sell, relinquish,

and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" for $600,000. 28 Stat. at 314-15. Article VIII provided that the portions of the ceded land currently occupied by the United States for "agency, schools, and other purposes" would be reserved from sale to settlers. 28 Stat. at 316. Article XVIII stated that the agreement did not abrogate the Tribe's rights under the 1858 treaty, 28 Stat. at 318, but this language pertained only to the right to receive annuities, not to the reservation boundaries. *See Yankton*, 118 S.Ct. at 799. Several other sections of the agreement are relevant to these appeals, but many are not.[5]

By 1893 the Commissioners had collected the signatures required to show endorsement of the agreement by a majority of the adult male members

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[5] Articles VII, IX-XVI, and XIX-XX have little bearing on the issues here. Article VII provided for gifts of gold pieces to tribal members. 28 Stat. at 316. Article IX allowed uncultivated allotted land to be leased. *Id.* Article X allowed religious societies to purchase ceded land on which they were operating. *Id.* at 316-17. Article XII provided that the money paid under the agreement was not subject to claims by creditors. *Id.* at 317. Article XIII fixed the status of mixed bloods. *Id.* Article XIV required the government to complete the allotment process as soon as possible. *Id.* Article XV settled the claims of the Yankton scouts who had not been paid for their services. *Id.* Article XVI settled the Tribe's claim to the Pipestone Reservation. *Id.* at 317-18. Article XIX required a copy of the agreement to be placed in the Yankton "Agreement Book." *Id.* Article XX bound the parties upon ratification by Congress. *Id.*

of the Tribe. Congressional action to ratify the agreement was delayed, however, by the need to investigate allegations of fraud in the procurement of signatures. Congress finally ratified the agreement on August 15, 1894, along with two other similar surplus land sale agreements. 28 Stat. at 314-20. The 1894 Act incorporated the entire 1892 agreement, appropriated necessary funds, prescribed a punishment for violating the liquor prohibition, and reserved some sections for common school purposes. *Id.*

B.

Our starting point in analyzing the 1894 Act is the Supreme Court's *Yankton* decision, which each side not surprisingly interprets in its own favor. The State asserts that *Yankton* provides an easy answer to the questions before the court because it shows that the reservation status of all land within the original boundaries has been lost. Because the Court relied on *DeCoteau*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300, for the proposition that certain language in the 1894 Act was precisely suited to terminating reservation status, and because *DeCoteau* had found the Lake Traverse Reservation completely disestablished, it necessarily follows that the 1894 Act similarly completely disestablished the Yankton Sioux Reservation. In contrast, the Tribe distinguishes *DeCoteau* and claims that *Yankton* 's [sic] holding of diminishment does not mean the reservation has been disestablished or its exterior boundaries changed.

Justice O'Connor, writing for the unanimous *Yankton* Court, articulated its precise holding as follows:

> In sum, we hold that Congress diminished the Yankton Sioux Reservation in the 1894 Act, that the unallotted tracts [which were ceded to the United States through that Act] no longer constitute Indian country, and thus that the State has primary jurisdiction over the waste site and other lands ceded under the Act.

Yankton, 118 S.Ct. at 805. The Court explicitly declined to decide whether or not the 1894 Act altered the status of the nonceded lands. As Justice O'Connor explained, "[w]e need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* Whether or not other land within the original reservation boundaries retained its reservation status thus remained an open question.

Although the Court used *DeCoteau* in reaching its conclusion of diminishment, the *Yankton* holding was explicitly more limited than that in the earlier case. In *DeCoteau*, the Supreme Court analyzed the circumstances surrounding the ratification and the text of an agreement ceding certain lands on the Lake Traverse Reservation to the United States and held that the reservation there had been completely disestablished. *DeCoteau*, 420 U.S. at 427, 95 S.Ct. 1082. The background of the Lake Traverse agreement was very different from that of the 1894 Act, however,

because the tribal members there had expressed their clear desire to terminate their reservation. *See DeCoteau*, 420 U.S. at 432, 95 S.Ct. 1082. In exchange they negotiated allotments for each individual, including married women. *See Act of March 3, 1891*, ch. 543, 26 Stat. 989, 1037-38. The circumstances surrounding the negotiation of the 1892 agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation. Even more important, the content and wording of the agreements are very different, aside from the particular cession language the Supreme Court compared in *Yankton*. *Compare* 26 Stat. 1036-38, *with* 28 Stat. 314-18.

It is well established that similar treaty language does not necessarily have the same effect when dealing with separate agreements. Justice O'Connor writing for the Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, ___, 119 S.Ct. 1187, 1203, 143 L.Ed.2d 270 (1999), warned against reaching this conclusion.

> The . . . argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction. . . . Th[e] review of history and the negotiations of the agreement is central to the interpretation of treaties.

Context has been found to play a similarly important role in interpreting the language of the surplus land acts.[9] *See Solem v. Bartlett*, 465 U.S. 463, 469, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Commissioners negotiating on behalf of the United States told the Yankton tribal representatives that "[The Great White Father] wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 49. In light of the significant contextual differences, we cannot assume that the Court's citation to *DeCoteau* means that that case controls the issues raised here.

The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S.Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of

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[9] Although in 1871, Congress terminated treaty making with Indian tribes, the United States continued to negotiate agreements with them in much the same manner as it had negotiated treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 127-28 (1982 ed.). The 1892 agreement itself was also sometimes referred to as a "treaty." *See, e.g.*, S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48 (statement of Commissioner Cole to tribal negotiations); 1894 Commissioner Letter at 5 (letter from Commissioner of Indian Affairs referred to the Secretary of the Interior).

the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders.*" *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.

The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status – the Unitah Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation. Long after the Tenth Circuit held that the Unitah Valley Reservation had been neither disestablished nor diminished, *Ute Indian Tribe v.*

Utah, 773 F.2d 1087 (10th Cir.1985) (en banc), the Supreme Court decided in a different case that the reservation had been diminished, *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). The Tenth Circuit then modified its *Ute* decision to the extent it was in direct conflict with *Hagen,* holding that the ceded lands did not retain reservation status, but it did not change its position regarding the status of the other lands within the original reservation boundaries. *Ute Indian Tribe v. Utah,* 114 F.3d 1513, 1520 (10th Cir.1997). The Tenth Circuit indicated that the reason it went no further in its 1997 decision was because of concern for finality in light of years of reliance on its earlier holding. *See id.* at 1524, 1527.

Based on our interpretation of what the Court said in *Yankton,* the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction.

C.

Congressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands. *See Rosebud Sioux Tribe,* 430 U.S. at 586, 97 S.Ct. 1361. After land is set aside for an Indian reservation, it retains that status until

Congress explicitly indicates otherwise. *See Solem*, 465 U.S. at 470, 104 S.Ct. 1161. Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986). Such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Whether Congress intended to disestablish the reservation completely, or whether it intended all or some of the nonceded land to retain its reservation status is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by nineteenth century legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian country.

As mentioned earlier, three different categories of land currently qualify as Indian country:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. This definition of Indian country was codified in 1948, and its key provisions have remained unchanged since that time. The State places great emphasis on the distinction this definition makes between land that is Indian country because it is part of a reservation, § 1151(a), and land which qualifies as Indian country under § 1151(c) because of its allotment status. An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment). *See United States v. Stands,* 105 F.3d 1565, 1571-72 (8th Cir.1997). Under § 1151(c) both types of allotments are Indian country regardless of whether they are on or off an Indian reservation. 18 U.S.C. § 1151(c); *see also Alaska v. Native Village of Venetie,* 522 U.S. 520, 118 S.Ct. 948, 953, 140 L.Ed.2d 30 (1998). In contrast, lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under § 1151(c); but they may be classified as Indian country under § 1151(a) if they are within the boundaries of an Indian reservation. *See Stands,* 105 F.3d at 1572.

The parties all agree that lands originally allotted to individual tribal members that are still held in trust by the United States are Indian country within the meaning of § 1151(c), but they dispute whether the Yankton Sioux reservation still exists and whether any nonceded lands fit the current understanding of Indian country in § 1151(a). The State argues that

although Congress intended some lands to retain their status as Indian country because of their status as allotments, it did not intend to maintain any reservation. The Tribe, on the other hand, argues that the 1894 Act only altered the status of the ceded lands and that the reservation status of all other lands within the original 1858 boundaries was not changed.

Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem,* 465 U.S. at 468, 104 S.Ct. 1161. Lands to which the Indians did not have any property rights were never considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist, *see id,* and on the belief that allotting lands, and purchasing those left unallotted, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.,* 543 F.2d 676, 695 (9th Cir.1976). The 1894 Congress would have felt little pressure to

specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

With this background in mind, *see Yankton,* 118 S.Ct. at 798, we consider whether the 1894 Congress intended to eliminate the Yankton reservation entirely or whether it intended to maintain the reservation status of some or all of the nonceded land. We apply the standard rules of interpretation for surplus land act cases. Each act must be analyzed individually, its effect depending on the language used and the circumstances of its passage. *See Solem,* 465 U.S. at 469, 104 S.Ct. 1161. The statutory language provides the most probative evidence of congressional intent. *See Rosebud Sioux Tribe,* 430 U.S. at 586, 97 S.Ct. 1361. Also relevant are the legislative history of the act and its historical context, including events surrounding the statute's passage which shed light on the contemporaneous understanding of it. *See Hagen v. Utah,* 510 U.S. 399, 411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Treaties with Indians are also interpreted to give effect to the terms as the Indians themselves would have understood them. *See Mille Lacs Band of Chippewa Indians,* 119 S.Ct. at 1200. To a lesser extent, the subsequent treatment of the area is also relevant. *See Yankton,* 118 S.Ct. at 798. Under certain circumstances the "justifiable expectations" of the parties are considered, *see Rosebud Sioux Tribe,* 430 U.S. at 605, 97 S.Ct. 1361, as well as changes in the demographics of the area, *see Hagen,* 510 U.S. at

411, 114 S.Ct. 958 All ambiguities are resolved in favor of the Indians, and neither diminishment nor disestablishment will be found lightly. *See Yankton,* 118 S.Ct. at 798; *Hagen,* 510 U.S. at 411, 114 S.Ct. 958.

The primary purpose of the 1892 agreement, which was ratified by the 1894 Act, was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States. The specific language accomplishing this goal is found in Articles I and II of the agreement. Article I states that the Tribe agrees to "cede, sell, relinquish, and convey to the United States all their [sic] claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation." 28 Stat. at 314. Article II provides that the United States agrees to pay the Tribe $600,000 "in consideration for the lands ceded, sold, relinquished, and conveyed to the United States." *Id.* at 315. The text of these articles refers explicitly only to the ceded lands.

The State argues that the cession of these lands necessarily terminated the reservation status of all lands within the original 1858 boundaries. It contends that allotments were intended to be temporary in nature and cannot alone constitute a reservation. It believes the failure of the Tribe to retain ownership in common of land for itself means that the reservation was disestablished. The State asserts that uncertainty about whether the Tribe owned land in common in 1894 was the key point which kept the *Yankton* Court from finding the reservation disestablished. Now that it has produced evidence to resolve

that question in its favor and the district court has found that the Tribe did not reserve any lands in 1892 to be held in common, *see Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d at 1154, the reservation must be found disestablished. We cannot agree that the Supreme Court expected this point alone to be dispositive, however, for it said that among the factors causing it to limit its holding was "the fact that the Tribe *continues* to own land in common." *Yankton*, 118 S.Ct. at 805 (emphasis added), an apparent reference to the Tribe's current landholdings.

The State also relies heavily on what it views as the background understanding of the 1894 Congress to support its conclusion that cession of all land held in common by the Tribe necessarily terminated the reservation status of everything within the original 1858 boundaries. It cites the comment in *Yankton* that around the turn of the century "'[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.'" *Id.* 118 S.Ct. at 798 (quoting *Solem*, 465 U.S. at 468, 104 S.Ct. 1161). It is important to keep in mind that it is not clear that the reference in *Solem* to "tribal ownership" meant ownership of land in common by the Tribe, as opposed to ownership by a tribal member.[10] In any event Indian tribes did not hold

[10] A careful reading of the relevant passage in *Solem* suggests that the Court used the terms "reservation lands" and "Indian lands" interchangeably to refer to all lands in which Indians had a property interest when it was discussing the

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ownership rights to land, but rather rights to exclusive use and occupancy of land. *See Spalding v. Chandler*, 160 U.S. 394, 403, 16 S.Ct. 360, 40 L.Ed. 469 (1896). Although the background understanding of the 1894 Congress "informs our inquiry," *id.*, courts have not been willing to extrapolate from general legislative assumptions and expectations of the late nineteenth century to find in each surplus land act a specific congressional purpose to remove all lands not under Indian control from reservation status. *See Solem*, 465 U.S. at 468-69, 104 S.Ct. 1161. If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status – a conclusion the Supreme Court has explicitly refused to adopt. *Id.*

More persuasive arguments regarding the interpretation of Articles I and II are drawn from evidence which places the Act in its full historical context and

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assumptions of Congress in the early nineteenth century. *Solem* contrasted lands that "retained reservation status" from those that were "divested of all Indian interests," and the Court appeared to use both the words "reservation lands" and "Indian lands" to refer to lands that retained their reservation status. *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. "Indian lands" included: "[o]nly those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Id.* Finally, the Court specifically pointed out that "only in 1948 did Congress uncouple reservation status from *Indian ownership*." *Id.* (emphasis added).

sheds light on the parties' contemporaneous understanding of the impact of the cession. The State argues that this evidence shows that the "'cession' and 'sum certain' language" in Articles I and II, *see Yankton*, 118 S.Ct. at 798 (citation omitted), was intended to terminate the reservation status of all lands within the original reservation boundaries. The Tribe argues that these same documents establish that the parties understood that these articles would only terminate the reservation status of the ceded lands.

The Commissioners who negotiated the agreement on behalf of the United States retained detailed records of the councils held to negotiate the sale of the unallotted lands and prepared an extensive report which was submitted to Congress along with the agreement. *See* S. Exec. Doc. No. 27, 53d Cong., 2d Sess. (1894). Two key points can be discerned from these records. First, the Commissioners indicated to the tribal representatives that their primary objective was the purchase of the *unallotted* lands. Second, the Commissioners emphasized to the tribal representatives that tribal members needed to move into the modern, post tribal era and that the sale of the unallotted lands would constitute one step toward that ultimate goal. *See id.*

The Commissioners repeatedly emphasized that they had one primary purpose. Commissioner Adams, for example, introduced the Commission's purpose, stating that "we . . . understand that you own, outside your allotments, a large quantity of land in common.

It is this land that you own in common that we were appointed by the Great Father to talk to you about." Council of the Yankton Indians (Oct. 8, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 48. They also indicated that the tribal leadership would retain some governing powers, suggesting for example, that: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* The Yankton Sioux could have interpreted such comments to indicate that their powers of self government, which at that time were limited to lands in which Indians had a property interest, would not be further limited and that the cession of the unallotted lands would not alter the Tribe's control over the lands retained by the Indians. Although the Commissioners were careful not to make promises concerning the scope of tribal self government powers, the references to a continuing tribal government suggest the parties did not intend to disestablish the reservation.

The Commissioners' introductory remarks, however, also emphasized that the tribal members needed to adapt to the modern era and urged them to allow settlers on the then unallotted lands so that they could learn from the white man how to farm, conduct business, and be citizens. *Id.* In line with the assumption that the reservation system would soon be outmoded, Commissioner Cole admonished:

> In your old life the tribal condition was a necessity. It united you and protected you and made you strong. But you are now living under new conditions and you must drop your old forms which are not suited to these conditions and take up new forms suited to your new mode of life. The Government seeing this sent an allotting agent to you to help you divide you [sic] land and select your homes. . . .
>
> Now that you have your homes and that your allotted lands are more than you can make use of, you have sent word to Secretary Noble that you desire to sell your surplus lands and get money to help you to improve your farms and build good houses and buy stock. The Great Father and his Great Secretary . . . have sent us here to buy [the] surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands more valuable.

Id. at 50. At the time the cession agreement was negotiated, the allotment process was not even complete; many allotments remained to be finalized. *See* 1894 Commissioner Letter at 5. The concept of individual property ownership was new to the Indians, and although it was hoped allotment would stimulate individual effort to improve the land, there is little indication that this concept had taken root. *See* Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 14-16

(1893 Report). The Indians thus could easily have understood these statements to mean that the status of the lands that had been allotted to them would not be changed by the agreement, and that they would retain control over these lands as in the past.

The Commission's report to Congress highlights its hope that assimilation would be promoted by the allotment of reservation lands and the cession of those that remained unallotted, but the report also suggests the parties recognized a division between unallotted and ceded lands. The Commission indicated that "now that [the members of the tribe] have been allotted their lands in severalty and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past." Report of the Yankton Indian Commission (Mar. 31, 1893), reprinted in S. Exec. Doc. No. 27, at 7, 19 (hereinafter Report). The Supreme Court found this language supported its conclusion that the 1894 agreement divested the Tribe of jurisdiction over the ceded lands. *Yankton*, 118 S.Ct. at 803.

This same report also indicates, however, that the ceded and nonceded lands would be treated differently, at least for as long as the Indians retained property in common, suggesting that the divestiture of jurisdiction was not complete. In explaining to Congress why they had such difficulty negotiating a price for the land, the Commissioners explained.

> On the matter of price we encountered much difficulty. Two important factors in determining the value of these lands seem to have been wholly overlooked by both the Indians and their friends: First, That the Indians were not selling their whole reservation, but less than two-fifths of it, and that more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it, and free from taxation for twenty five years; second, that the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians. We think the value of these surplus lands per acre would be doubled if the whole reservation were being disposed of by the Indians, to be equally improved by white people and uniformly taxed.

1893 Report at 13. This report is evidence of the parties' understanding that only a portion of the reservation was being separated at that time, and also suggests that the negotiations were complicated by the Indians' differing conception of land use and property ownership.

The Commission's reports do not describe any reservation boundaries or mention any transfer of the Yanktons' tribal sovereignty. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135, 1148 (D.S.D.1998). Instead, these reports show only that the Commissioners emphasized the need for the Indians eventually to become completely assimilated into the

"modern era" and encouraged them to sell their surplus lands to aid in this process. Although the sale of the surplus lands was characterized as a step required by changes of the modern era, it was not directly equated with the loss of control over other lands. In sum, the plain language of the text of Articles I and II only refers to the ceded lands, and the reports of the Commission do not indicate the "clear and plain" congressional intent required to show the reservation status of all nonceded lands was terminated by this Act. The evidence is thus insufficient to establish that the "cession and sum certain" language of Articles I and II was intended to disestablish the reservation.

There are other provisions of the agreement which may shed light on the intended impact on unallotted lands. The State directs our attention to Articles III-VI and XI, which established a complex system for the payment of the purchase price of $600,000. 28 Stat. 315-17. It points out that some aspects of the payment plan were linked to the twenty five year trust period and argues that this shows that such lands retained their Indian country status because the Indian title to the allotments had not yet been extinguished. The Tribe, on the other hand, argues that the provision allowing for the Act's creation of a fund to support schools, courts, and other tribal institutions evidences congressional intent to preserve tribal self government within the 1858 boundaries and to maintain reservation status for the allotted lands.

According to the agreement for payment, $100,000 was to be divided among the members of the tribe per capita, and $500,000 was to be placed into an interest bearing account for the benefit of the Tribe. Article V provided that interest from that account could be used to set up a fund to meet basic needs of the tribal members, or it would be distributed on a per capita basis to tribal members. 28 Stat. at 315. After the trust period expired on the allotted lands, any monies remaining in the original account or in the fund were to be disposed of by the Secretary of the Interior for the benefit of the Tribe. Arts. IV, V, 28 Stat. at 315. Article IX provided that the allotted land of any tribal members who died without heirs within twenty five years was to be sold and the proceeds added to the fund provided for in Article V. 28 Stat. at 315-17.

The Tribe places great emphasis on Article V because it specifically provided that some of the interest due on payment funds might be set aside and used "for the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians . . . ; for schools and educational purpose for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe." 28 Stat. at 315. Institutions that might have qualified for such monies included the Indian police force and the Court of Indian Offenses, both of which the district court found still operative at the time of ratification. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d, at 1150. It is undisputed that this

optional fund was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent. Article V clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux in terms of education, justice, and "other local institutions." Nevertheless, section 2 of the article also contemplated a future in which such a fund would not be needed when the Indians might receive "complete title to their allotted lands and . . . assume[ ] all duties and responsibilities of citizenship." 28 Stat. at 315.

The prohibitions on the sale of alcohol found in Article XVII provide further insight into the parties' intent. This article provides that "no intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. at 318. The Supreme Court found this provision indicated that the parties intended to diminish the reservation by the Act of 1894, reasoning that the language would have been superfluous if all lands were to retain their reservation status. *See Yankton*, 118 S.Ct. at 801. The language would also have been superfluous if the parties had intended to disestablish the Yankton Sioux Reservation. The Court found it significant that the provision "signal[ed] a jurisdictional distinction between reservation and ceded land. *Id.*" In this article the parties acknowledged the

continued existence of two distinct categories of land to which different laws might apply.

Article VIII, the "agency lands provision," provides strong evidence that a reservation was expected to remain in existence. This provision provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes." 28 Stat. at 316. As the Supreme Court noted, this provision "counsels against finding the reservation terminated." *Yankton,* 118 S.Ct. at 801. The Court cited its prior interpretation of virtually identical language in *Solem* where it reasoned that it would be "'difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton,* 118 S.Ct. at 801 (citing *Solem,* 465 U.S. at 474, 104 S.Ct. 1161). Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe indicates that some lands were expected to remain outside of primary state jurisdiction.

The State argues that the retention of this land is irrelevant to our analysis because the provision does not specify that such reserved land remained in reservation status, and the federal government's continuing obligations were based on the fact that Indian allottees held patents for their land in

trust. Nothing in Article VIII specifically ties the government's retention of these lands to the trust period, however, or indicates that its obligations were expected to end when the trust period expired. Instead, the Article says that the lands would be retained "until they are no longer required for such purposes." 28 Stat. at 316. And in 1929 the lands were returned to the tribe for common purposes. Act of February 13, 1929, ch. 183, 45 Stat. 1167 (explicitly providing that the lands could not be allotted).

Neither the text of the 1894 Act nor evidence of the parties' contemporaneous understandings clearly establish an intent to disestablish the Yankton Sioux Reservation. The reports indicate that the Commissioners' statements may have sent mixed messages to the Indians in that they sometimes talked about continuing tribal control over land and sometimes suggested that the property bonds of the Indians would be severed. The Indian understanding of land use and control differed from the European American notion of individual property ownership and the Commissioners' mixed messages could have led the Yankton Sioux to believe that their control over the lands retained in trust for individual members would remain unchanged. *See* Felix Cohen, *Handbook of Federal Indian Law* 131-32 (1982 ed.); *see also,* Michael L. Ferch, Indian Land Rights, 2 *Transnat'l L. & Contemp. Probs.* 301 (1992) (comparing the Indian view of property rights with the western view).

The Act could not foresee all that would happen in the future with population movement, state development, and changing Indian policy, but it contained provisions showing concern for future interests of the Indians in common, as well as provisions recognizing that conditions were sure to change as white settlers moved in to the opened reservation with the expectation of state support. In the Act, the federal government reserved land to provide for tribal needs in Article VIII, and the parties recognized a distinction between ceded and reservation lands in Article XVII. The Act did not leave all land within the original exterior reservation boundaries under tribal control, *see Yankton,* 118 S.Ct. at 805, or define new reservation boundaries, and nothing in its text or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non Indians who purchased land after it lost its trust status. Some articles of the Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the State or territory in which he resided. 24 Stat. at 389-90. Article V indicates that the fund which could be established to provide for helpless and infirm tribal members would no longer be needed "[w]hen the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands and shall have assumed all the duties and responsibilities of citizenship." 28 Stat. at 315. Congress also added the so-called "school sections clause" to the Act which parallels language in the

South Dakota enabling act, Act of Feb. 22, 1889, 25 Stat. 679, and provided that certain sections of the ceded land would be reserved for common schools, 28 Stat. at 319. This suggests that as more white settlers came on to the opened lands, increased state involvement on their behalf was expected, and the jurisdiction of the State was expected to increase over time.

In sum, the 1894 Act did not clearly disestablish the Yankton Sioux Reservation, but it intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders. The text of the 1894 Act, read in its full historical context, establishes that the intent was to cede certain lands to the United States and to open areas of the Yankton Sioux Reservation to white settlers, as well as to reserve land to be used to care for continued tribal interests. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non Indians. It was then foreseen that the trust period over the allotments would at some point come to an end, but we note that some of this allotted land apparently remains in trust to this very day.

D.

The treatment of the Yankton area in the years following the passage of the Act provides further evidence that the nonceded lands retained their

reservation status until they passed out of trust. Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, *Yankton,* 118 S.Ct. at 804, courts have consistently recognized that events occurring after the passage of a surplus land act may shed light on the contemporaneous understanding of the act, *see Solem,* 465 U.S. at 470-71, 104 S.Ct. 1161; *see also Hagen,* 510 U.S. at 411, 114 S.Ct. 958. Established jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration. *Rosebud Sioux Tribe,* 430 U.S. at 604-05, 97 S.Ct. 1361.

Congress took a definitive and considered step when it decided to return title to the Yankton Sioux Tribe for the lands that had been reserved for federal use in the 1894 Act. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.[11] Congress not only returned the

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[11] References cited by the parties to administrative documents and maps, which either refer to the Yankton Sioux Reservation or lack any such reference, were found by the Supreme Court to have "limited interpretive value." *Yankton,* 118 S.Ct. at 803-04 The use of the term "Yankton Sioux Reservation" in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands. Moreover, problems associated with relying on the presence or absence of a cite on a map is illustrated by the failure of a prestigious map maker to include the states of North Dakota, South Dakota, Oklahoma and parts of Minnesota, Iowa, and Kansas in one world atlas. *See* Richard

(Continued on following page)

land to the Tribe, but also specifically provided that the land would not become available for allotment purposes. *Id.* Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Yankton,* 118 S.Ct. at 803, the return of these lands to tribal control suggests that the reserved lands were always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed. This action indicates that at the close of the era, the United States government understood, as it continues to argue today, that the Yankton Sioux reservation was not completely disestablished in 1894.

Longstanding divisions of jurisdictional authority have also been entitled to considerable weight in similar boundary disputes. *See Rosebud Sioux Tribe,* 430 U.S. at 605 n. 28, 97 S.Ct. 1361. The State has presented uncontroverted evidence showing that the State has assumed primary jurisdiction over unallotted lands that have passed out of trust status. The Tribe has not established reason to doubt the veracity of the various letters and reports of several Superintendents of the Yankton Agency and Commissioners of Indian Affairs which indicate that the federal government only exercised jurisdiction over allotted lands held in trust and the agency reserve. In

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J Margolis, "How the West Was Lost," *The New Leader,* p 13 (Nov. 27, 1989) (discussing the omission of these states from Rand McNally's 1989 *Photographic World Atlas*)

addition, three former United States Attorneys for the District of South Dakota testified that during their tenures, which collectively cover most of the years between 1965 and 1991, the federal government continued to exercise jurisdiction only over those lands actually held in trust. The Tribe has presented evidence indicating that it maintained a tribal police force and an independent judicial system following the passage of the 1894 Act.[12] It has also presented evidence suggesting that the State did not always allocate sufficient resources to enforce its laws consistently within the original reservation boundaries. While this evidence may show problems of enforcement, it does not prove that the Tribe or the federal government exercised jurisdiction over the whole area. On the record before the court, the Tribe has not presented any new evidence to undermine the Supreme Court's statement that the Tribe has not asserted civil, regulatory, or criminal jurisdiction over lands other than those held in trust, *Yankton,* 118 S.Ct. at 804, and "the longstanding assumption of jurisdiction by the State over [a predominately non-Indian area creates] justifiable expectations which should not be upset by [a] strained . . . reading of the

[12] The Tribe's position on this evidence is not contested. A court of Indian offenses was in existence at the time of the treaty in 1894. Although it was abolished in 1909, its duties were taken over by the Superintendent until it was reinstated in 1943. The court was replaced in 1945 with the Yankton Sioux Tribal Court, but there is no evidence that this court ever exercised jurisdiction over lands owned by non-Indians

Acts of Congress," *Rosebud Sioux Tribe*, 430 U.S. at 604-05, 97 S.Ct. 1361.

III.

In 1858 Congress designated the Yankton Sioux Reservation as an area set aside for the exclusive use of the Yankton Sioux Tribe. The status of the lands which initially comprised this reservation were later altered when the federal government allotted lands previously held in common by the Tribe to individual Indians and then purchased the remaining unallotted lands to open them up for homesteading. In *Yankton*, the Supreme Court held that the cession of the unallotted lands in 1894 removed these lands from the reservation and indicated that the 1858 boundaries were not maintained. The text of the 1894 Act and evidence regarding the parties' contemporaneous understanding of it establish that the reservation was maintained, but do not define its precise boundaries. When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non Indian hands.

For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18

U.S.C. § 1151. We recognize that the original exterior treaty boundaries of the reservation have not been maintained. *See Yankton,* 118 S.Ct. at 799-800. We also assume that land now owned in fee by individual Indians is not under tribal jurisdiction unless it is found to be "within the limits of [the] Indian reservation." 18 U.S.C. § 1151(a). On the record before the court, however, we cannot define the precise limits of the reservation which remains.

The current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record. Since both sides have followed an all or nothing strategy (the State arguing disestablishment and the Tribe claiming maintenance of the 1858 boundaries), neither side spent much time developing the record on the specifics of this trust land. The South Dakota Supreme Court has said that the reservation was reduced by the 1894 Act "from a 410 square mile (430,495 acre) sanctuary down to what is presently scattered Indian holdings of approximately 40,000 acres." *State v. Greger,* 559 N.W.2d 854, 859 (S.D.1997). It also stated that in modern times both Indians and non Indians refer to the reservation "as a 'mile square'" *id.,* in reference "to the tribal headquarters area at Marty," *id.* at 859 n. 4. The Supreme Court later stated in *Yankton* that currently less than ten percent of the 1858 reservation lands remains "in Indian hands," 118 S.Ct. at 804, and that within the original exterior reservation boundaries, there are only 30,000 acres held in trust for individual Indians, and 6,000 acres of "tribal lands," *id.* at 796.

References in the briefs in these cases and in judicial opinions are not always clear about what is meant by trust land. The term is variously used to include 1) the land reserved to the federal government in the 1894 Act and later returned to the Yankton Tribe, 2) land allotted to individual Indians that remains held in trust, and 3) land taken into trust under the Indian Reorganization Act of 1934. Efforts at oral argument to get precise statements from the parties identifying what trust land remains were unsuccessful. At this time we hold only that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a), and we leave it to the district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust.

The judgments of the district court are affirmed in so far as the court concluded that the Yankton Sioux Reservation has not been clearly disestablished, but the judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact and that all nonceded lands remain part of the reservation. The permanent injunctions entered by the district court are vacated, and the cases are remanded for further proceedings consistent with this opinion.

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14 F.Supp.2d 1135

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE,
and its individual members, Plaintiffs,
United States of America, on its own behalf and
for the benefit of the Yankton Sioux Tribe,
Plaintiff-Intervenor,

v.

Matt GAFFEY, States Attorney of Charles Mix
County; Herman Peters, Bruce Bakken, and
Jack Soulek, Members of the Charles Mix, South
Dakota, County Commission; William Janklow,
Governor of South Dakota; and Mark Barnett,
Attorney General of South Dakota, Defendants,
The YANKTON SIOUX TRIBE, federally recognized
tribe of Indians, and its individual members, and
Darrell E. Drapeau, individually, a member of the
Yankton Sioux Tribe, Plaintiffs,

v.

SOUTHERN MISSOURI WASTE MANAGEMENT
DISTRICT, a non-profit corporation, Defendant.
SOUTHERN MISSOURI WASTE MANAGEMENT
DISTRICT, Third-Party Plaintiff,

v.

STATE OF SOUTH DAKOTA,
Third-Party Defendant.
Nos. Civ. 98-4042, Civ. 94-4217.

Aug. 14, 1998.

Robin L. Zephier, Rapid City, SD, Michael H. Scarmon, Stickney & Groe, Elk Point, SD, James G. Abourezk, Sioux Falls, SD, for Plaintiffs.

Tommy Drake Tobin, Winner, SD, Matthew F. Gaffey, Charles Mix County State's Atty., Lake Andes, SD, for Defendants.

Kenneth W. Cotton,Wipf & Cotton, Wagner, SD, for Interested Party Southern Missouri Waste Management Dist.

Kenneth W. Cotton, Wipf & Cotton, Wagner, SD, Mr. Timothy R. Whalen, Lake Andes, SD, for amicus.

Karen E. Schreier, U.S. Attorney, Rita D. Allen, Sioux Falls, SD, for Intervenor-Plaintiff U.S.

John P. Guhin, Pierre, SD, for Defendant/ Counterclaimant William Janklow.

Roxanne Giedd, John P. Guhin, Charles D. McGuigan, Pierre, SD, for State of S.D.

MEMORANDUM OPINION AND ORDER

PIERSOL, District Judge.

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court held that the 1894 Act of Congress ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus tribal lands terminated the reservation status of those unallotted, ceded lands, resulting in the diminishment of the Yankton Sioux Reservation. The Supreme Court reached this decision with full acknowledgment that the "context of the [1894] Act is not so compelling that, standing alone, it would

indicate diminishment[.]" *Id.* 522 U.S. 329, 118 S.Ct. at 802. Rather, the Supreme Court relied upon the surrounding circumstances of the Act to conclude that Congress intended to diminish the reservation. The issue remaining for decision in these cases consolidated following the Supreme Court's remand is whether the 1894 Act of Congress disestablished the Yankton Sioux Reservation.

Although the parties to this litigation have at times used the terms "diminishment" and "disestablishment" interchangeably, the Court in this opinion uses each word to convey a particular meaning. As noted by the United States Court of Appeals for the Eighth Circuit in its vacated opinion, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439, 1443 n. 4 (8th Cir.1996), the term "disestablishment" is "more precisely used to describe the relatively rare elimination of a reservation, *see e.g., DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), as opposed to reduction in the size of a reservation or 'diminishment.' *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977)." The Supreme Court carefully stated in *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 805, that its holding was limited to the narrow question of whether the 1894 Act diminished – that is, reduced the size of – the Yankton Sioux Reservation. As in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the Supreme Court declined to "determine whether Congress disestablished the [Yankton Sioux]

reservation altogether[.]" *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 805.

The Court now answers the question left open by the Supreme Court and, for the reasons explained thoroughly below, holds that the 1894 Act of Congress ratifying the cession and sale of surplus tribal lands did not disestablish the Yankton Sioux Reservation. The 1894 Act of Congress was not one of those "relatively rare" pieces of legislation that resulted in the elimination of a reservation. Rather, by ratifying the 1892 Agreement with the Yankton Sioux Tribe, Congress, in the words of the Supreme Court, modified or reconceptualized the Yankton Sioux Reservation. *See Yankton Sioux Tribe*, 522 U.S. at ___, ___, 118 S.Ct. at 798, 802. The Yankton Sioux Reservation, as diminished by the 1894 Act, encompasses all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes, within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe.

Federal law defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. The Yankton Sioux Reservation, as described above, is "Indian country" within the meaning of the federal statute.

I. Treaties and the End of Treaty-Making With the Yankton Sioux

The Yanktons belong to one of fourteen tribes in the federation of Sioux, and included 32,000 people claiming use rights to approximately 100 million acres of land upon the arrival of non-Indians during the 17th century. H. Hoover, *A Yankton Sioux Tribal Land History* at 2 (1995). (Pl. Ex. 31.) During the 18th century, when members of the federation spread by tribes and bands to occupy the historic Sioux Country, about two thousand Yanktons took up residence over the central portion between the Des Moines and Missouri Rivers, south of the present boundary that divides North and South Dakota. *Id.* By the early 19th century, the Yankton Sioux exclusively controlled over 13 million acres of land. *Id.* The United States government formally recognized the Yankton Sioux Tribe as a political entity when the first treaty was negotiated in 1815. H. Hoover, *A History of Yankton Tribal Governance* at 1 (1995) (Pl. Ex. 78.) The United States negotiated subsequent treaties with the Yankton Sioux in 1830, 1836, 1837, 1851, and 1858. *Id.*

"After some years of earnest effort on the part of the Interior Department to induce the Yanktons to cede a portion of their territory, finally, in the fall of 1857," a military captain, with the assistance of Charles T. Picotte, a Yankton half-blood, persuaded the Yanktons to send a delegation to Washington, D.C., to confer with the Government in the early part of the winter of 1857-58. Report Of The

Commissioner of Indian Affairs at 423-24 (Oct. 1, 1891). (Gov't. Ex. 18.) In the resulting April 19, 1858 Treaty, 11 Stat. 743, (Pl. Ex. 1), the Yankton Sioux Tribe ceded and relinquished to the United States:

> all the lands now owned, possessed, or claimed by them, where ever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

The Yankton Sioux were to have exclusive occupation of the reservation lands, along with unrestricted use of the red pipestone quarry in the State of Minnesota. A land survey later conducted revealed that 430,495 acres were included in the land mass described by the 1858 Treaty and reserved to the Yankton Sioux. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894). (Pl. Ex. 5.) The land comprising the 1858 Yankton Sioux Reservation is located in the central to southeastern portion of Charles Mix County, South Dakota.

In the 1858 Treaty, the Yankton Sioux relinquished and abandoned all claims and complaints growing out of any and all treaties previously made by them or other Indian Tribes, except for their claim to annuity rights under the September 17, 1851

Treaty of Laramie. In return for the cession of land and release of claims, the United States agreed to protect the Yankton Sioux in their "quiet and peaceable possession" of the tract reserved to them. Article 10 of the Treaty provided that "[n]o white person," with certain exceptions, "shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States." The government also agreed to pay the Yankton Sioux or to expend for their benefit, starting the year of their settlement upon the reservation, the total sum of $1.6 million in annuities over a period of fifty years, ending in 1908. The government also agreed to expend additional amounts during the first year of the Tribe's settlement on the reservation for the purchase of stock, agricultural implements, and fencing, and for the construction of houses, schools, and other buildings.

In July 1859, United States Agent Alexander Redfield founded the Yankton agency between Chouteau Creek and Fort Randall. H. Hoover, *A Yankton Sioux Tribal Land History* at 3 (1995). (Pl. Ex. 31.) The Yanktons' head chief, Struck By The Ree, followed, and within a few months, some 2,000 tribal members pitched tipis close to the agency. Eight band chiefs helped to settle the tribal members on the reservation. *Id.* The Yanktons entered a "revolution in life style as they accepted confinement on the reservation." *Id.*

In 1859, surveyors marked the outer boundaries of the reservation and surveyed 166 rectangular lots for family assignment, 87 of which were downstream and 79 of which were upstream from the agency. *Id.* at 4. By 1860, there were 2,053 Yanktons on the reservation, segregated into seven bands. *Id.* A "Chief Farmer" managed the 360.73-acre agency compound at Greenwood, on the Missouri River, and "supervised agricultural development and acculturation across the reservation." *Id.* at 5.

In the years that followed the 1858 Treaty, the federal government did not provide the Yanktons all of the financial assistance promised. Settled close to the Missouri River or in the breaks of the Missouri Hills, the Yanktons broke prairie sod, opened farms, and built log homes. Report of the Commissioner of Indian Affairs at 424 (Oct. 1, 1891). (Gov't. Ex. 18.) Drought set in and burned up the crops, followed by devastating floods. As a result, the Yanktons believed that the Great Spirit was offended at them for cultivating the soil. *Id.* "Their work oxen and cows were soon in the soup, farm tools and wagons were soon thrown aside to rot, their clothing was cast off, and the whole nation went off on a buffalo hunt." *Id.* Upon their return many months later, the Yankton Sioux "found the Santees, their old-time allies, had opened up a horrid frontier war against the whites, and that emissaries from the hostile bands were waiting to counsel with them to engage the Yanktons also in hostilities against the Government." *Id.*

In 1864, when the Santee Sioux were raiding and killing the settlers of Minnesota, General Sully, at Fort Randall, enlisted in the service of the United States as scouts fifty-one Yankton Indians. "They took the field at once against their own kindred in defense of the white inhabitants of Dakota and Nebraska, and drove back the hostile Santees." Report of the Commissioner of Indian Affairs at 48 (1878). (Gov't. Ex. 18.) The Yankton scouts were honorably discharged at the end of the war, but without any pay, *id.*, a matter that would surface as a major point of contention with the Yanktons during discussions about the sale of their surplus lands in 1892. In the early 1880's, the Yankton Sioux claimed that, unlike other Indian tribes, "the blood of no white person stains their hands." Report Of The Commissioner of Indian Affairs at 61 (1881). (Gov't. Ex. 18.) The Yanktons viewed themselves as "[a]lways at peace and friendly even to taking up arms against their own relations," and believed that, as a result, they "should receive greater consideration and benefit from [the white] people and government; that on the contrary they receive less, while those who fought the government imbued their hands in white man's blood, and obtain all they ask." *Id.*

In 1869, Moses K. Armstrong conducted a second survey of family lots on the Yankton Sioux Reservation, marking 177 lots of 80 acres each. H. Hoover, *A Yankton Sioux Tribal Land History* at 5 (1995). (Pl. Ex. 31.) In 1874, J.W. Beaman surveyed additional lots of 40 acres each, to make one available for each

family. While several missionaries visited the reservation, Presbyterian John P. Williamson arrived as the first resident missionary in 1869, and Episcopal Father Joseph Cook settled in Greenwood in 1870. *Id.* at 4. As mission and federal facilities were built, "agency personnel gradually replaced 'recalcitrant' band chiefs with others more amenable to federal objectives[.]" *Id.* The growing population of non-Indian farmers, businessmen, and railroad men in the Upper Midwest pressured federal officials to open the surplus lands of Indian reservations for settlement.

"'The decade of the 1860's was marked by an increasing volume of general Indian legislation [by Congress], coincident with a decline in the use of Indian treaties as an instrument of national policy. . . . The formative era of Indian relations ended with the Appropriations Act of March 3, 1871, providing for the termination of treaty making with Indian tribes." F. Cohen, Handbook of Federal Indian Law 126-27 (1982) (footnote omitted) (hereinafter Cohen). Codified at 25 U.S.C. § 71, the statute provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

At least one commentator suggests that the "end of treaty making assumes an exaggerated historic importance unless understood in light of the comprehensive nature of federal involvement in Indian affairs." Cohen at 127 (footnote omitted). In the commentator's view,

> [t]he primary reason for the termination of treaty making in 1871 was political, the result of the House of Representatives' desire to have more control over Indian affairs and over the lands being ceded by the tribes. The federal-Indian relationship continued much as it had before 1871. Negotiations with tribes and land cessions resulted in "agreements" rather than treaties, and were ratified by both houses of Congress. Congress continued to establish reservations, make appropriations, and enact statutes affecting Indians. Like treaties, agreements and statutes are the "supreme law of the land," creating rights and liabilities that are virtually identical to those established by treaties.

Cohen at 127 (footnotes omitted). The prohibition on treaty-making "was a domestic political decision with little legal impact on the continuing relationship between the United States and Indian tribes[,]" and caused the federal government to look to other procedural methods in dealing with the Indian tribes. *Id.* at 128.

After 1871, a trend developed toward more comprehensive legislation as the government gradually moved away from the "tribe-by-tribe approach of

the treaty making years. The result was a steady increase in statutory power vested in Indian service officials and a steady narrowing of the rights of individual Indians and tribes." Cohen at 128. The process of allotment of tribal lands in severalty and the assimilation of the Indians into white culture was deemed to be important for Indians and non-Indians alike. *Id.* Years of debate on allotment proposals followed. *Id.* at 131.

On February 8, 1887, Congress passed the General Allotment Act, also known as the Dawes Act, 24 Stat. 388, which mandated the allotment of land to individual tribal members on the reservations and negated the previous family assignments of land parcels. H. Hoover, *A Yankton Sioux Tribal Land History* at 5-6 (1995). (Pl. Ex. 31.) The Dawes Act did not expressly mandate the elimination of reservations. Senator Dawes, sponsor of the bill, had favored a voluntary program of allotments, but eventually supported compulsory allotment because he became convinced, like the humanitarian reformers, that destruction of the tribal system was inevitable if Indians were to participate fully in the American system. Cohen at 131. Allotments of land to individuals were thought to be of primary importance because the Indian concept of tribally-owned land was fundamentally different from the whites' concepts of civilization and individual land ownership, and the whites' view was considered to be superior. *Id.* White reformers also thought that a government patent would create greater security for the Indian allottee than

would possession of land under tribal law or custom and that settling the Indians in a permanent place would end their nomadic behavior. Indians who favored allotment placed faith in the patent in fee as protection against white encroachment and removal by the government. Cohen at 132.

The Dawes Act provided:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon[.]

24 Stat. 388. Each head of a family was to receive one quarter section of land (160 acres), each single person over eighteen years of age and each orphan child under eighteen years of age was to receive one-eighth of a section (80 acres), and each single person under eighteen years of age or born prior to the date of the President's order directing allotment of the land was to receive one-sixteenth of a section (40 acres). *Id.* The Dawes Act further provided in section 5 that, upon approval of the allotments by the Secretary of

the Interior, the Secretary would issue a patent in the name of each allottee, to be held in trust by the United States for twenty-five years for the sole use and benefit of the Indian allottee, and in the case of the allottee's death, for the sole use and benefit of the allottee's heirs. Section 5 provided that, at the end of the trust period, the United States would convey the allotment

> in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void[.]

24 Stat. at 389. Congress gave the President authority to extend the trust period in his discretion. *Id.*

Section 5 of the Dawes Act, significantly for this litigation, further provided:

> That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell,* on such terms and conditions as shall be

> considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress[.]

24 Stat. at 389-90 (emphasis added).

The Dawes Act stated in section 6 that, upon completion of the allotments and the issuance of patents to the allottees, the allottees would be subject to the civil and criminal laws of the State or Territory in which they resided. Moreover, each allottee "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States." *Id.* at 390.[1]

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[1] In 1905, the Supreme Court interpreted section 6 of the Dawes Act "to mean that Indian allottees were subject to plenary state jurisdiction immediately upon issuance of the trust patent. *See In re Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905)." *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 118 S.Ct. 1904, 1907, 141 L.Ed.2d 90 (1998). Congress reversed the result of the *Heff* case in 1906 by passage of the Burke Act, 34 Stat. 182, 25 U.S.C. 349, *et seq.*, providing that state jurisdiction did not attach until the end of the 25-year trust period, when the lands were conveyed in fee to the allottees. *See United States v. Pelican*, 232 U.S. 442, 450, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914). The Burke Act, however, also contained a proviso permitting the Secretary of the Interior, if "satisfied that any Indian allottee is competent and capable of managing his or her affairs," to authorize issuance of a fee simple patent before the end of the usual trust period, removing all restrictions as to sale, incumbrance, and taxation of the land. *Cass County*, 524 U.S. at ___, 118 S.Ct. at 1907. The effect of the

(Continued on following page)

Some of the Yanktons resisted the new allotment policy, and four companies of troops were sent from Fort Randall to quell the disturbances and restore order. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Allotting Agent J. G. Hatchett arrived in 1889 to parcel out the individual allotments on the Yankton Sioux Reservation. *Id.* Protests by the Indians hampered his work, *id.*, but the allotments were completed that year and in 1890, Hatchett equalized the allotments, utilizing approximately one-half of the reservation. Report of the Commissioner of Indian Affairs at 428 (Oct. 1, 1891). (Gov't. Ex. 18.) Hatchett continued to refine the list of allotments, and in 1892 reported the assignment of 1,700 allotments on approximately 262,000 acres of the Yankton Sioux Reservation. H. Hoover, *A Yankton Sioux Tribal Land History* at 6 (1995). (Pl. Ex. 31.) Hatchett's report negated all previous land assignments, and tribal members were required to scatter on their new family farms located across the reservation. *Id.* at 6 & n. 15.

Of the 430,495 acres of land comprising the 1858 Yankton Sioux Reservation, 167,325 acres were allotted and patented to the Indians under the Dawes Act. By early 1894, allotments under the Act of February 28, 1891, 26 Stat. 594, had been made in the field, but those allotments had not been examined

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Burke Act and other post-ratification statutes on the Yankton Sioux allotments will be addressed later in this opinion.

and approved. The federal government estimated that some 95,000 additional acres had been allotted after passage of the 1891 Act, leaving surplus lands of approximately 168,000 acres, which were ceded by the Yankton Sioux for $600,000, or $3.62 per acre.[2] S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 5 (1894); (Pl. Ex. 5.)

Congress having officially ended treaty-making with the tribes in 1871, the last large-scale sale of land to the United States by the Yankton Sioux Tribe occurred as a result of an 1892 Agreement, after an 1884 government attempt to obtain the sale of the Yanktons' surplus lands failed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess., at 12 (1894); (Pl. Ex. 5.) In 1892, the Secretary of the Department of the Interior appointed three members to serve on the Yankton Indian Commission to negotiate the sale of the surplus land owned by the Yankton Sioux. (Pl. Ex. 28.) The three commissioners were John J. Cole, J. C. Adams, and Dr. W. L. Brown; however, Dr. Brown resigned from the Commission before an agreement was reached, and his replacement, L. W. French, was never qualified to act as a Commissioner and took no part in the negotiations. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 7-8, 34 (1894); (Pl. Ex. 5.) These

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[2] The Court of Claims later determined that the Yankton Sioux ceded 201,110 unallotted acres in the 1892 Agreement and that those acres had a fair market value of $1,337.381.50 [sic], or about $6 65 per acre, on December 31, 1892. *Yankton Sioux Tribe v United States*, 224 Ct.Cl. 62, 623 F 2d 159, 174 (1980)

discussions did not take place with tribal leaders in Washington, D.C., as had the negotiations resulting in the 1858 Treaty. The Commissioners were sent to the Yankton Sioux Reservation "to negotiate . . . for the cession of their surplus lands," and "[i]f [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain the relinquishment of such part thereof as they may be willing to part with."[3] Instructions to the Yankton Indian Commission (July 27, 1892), reprinted in *Yankton Sioux Tribe* U.S. Supreme Court Joint Appendix Vol. I at 98-99.

Although the 1894 Congress and courts have been careful to distinguish between the 1858 "Treaty" and the 1892 "Agreement," *see, e.g.,* S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 5.); *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 793, the Commissioners sent to the reservation and the Yankton Sioux repeatedly mentioned during the 1892 discussions concerning the sale of surplus lands that their work would result in a "treaty" that would be ratified by Congress. Before the Commissioners left the Yankton Sioux Reservation for Washington to present the 1892 Agreement to Congress, a copy of the Agreement was left in the Yanktons' treaty book, which was turned over to Rev. Williamson for

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[3] The Court agrees with the Eighth Circuit's earlier conclusion from these instructions that, "[h]ad the intent been the elimination of the reservation, it would have been necessary that all surplus lands be purchased." *Yankton Sioux Tribe,* 99 F.3d at 1452.

safekeeping. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-96, 97 (1894). (Pl. Ex. 5.) Moreover, then Secretary of the Interior Hoke Smith, in the first sentence of his 1894 cover letter submitting the Agreement and the reports of the work underlying it to Congress, stated that he had the honor "to submit herewith an agreement made by the commission appointed to treat with the Yankton tribe of Dakota or Sioux Indians[.]" *Id.* Similarly, the Acting Commissioner of Indian Affairs referred to the Agreement as a "treaty" in his report to the Secretary of the Interior, *id.* at 5, and those chiefs and head men of the Yankton Sioux Tribe who wrote to Congress urging ratification of the Agreement referred to it as the "treaty of December 31, 1892." S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 2 (1894). (Pl. Ex. 7.)

These references to treaty-making by the primary participants are significant, because the references establish that the Tribe, which likely was not aware that Congress technically had ended treaty-making by statute in 1871, nonetheless continued to view its interactions with the federal government within the historic context of the political relationship that had existed between the Tribe and the federal government beginning with the Treaty of 1815. The references also confirm the commentator's view that the "federal-Indian relationship continued much as it had before 1871[,]" Cohen at 127, and that the only major difference between a "treaty" and an "agreement" was that both Houses of Congress had to ratify

an "agreement," while only the Senate ratified a treaty.

II. The Sale of Surplus Lands and the 1892 Agreement

The crucial question presented is whether the 53rd Congress, legislating during the allotment era, intended by the Act of 1894, ratifying the 1892 Agreement with the Yankton Sioux, to disestablish the Yankton Sioux Reservation completely. This becomes a highly complicated question in light of the Supreme Court's *Yankton Sioux Tribe* decision holding that the Yankton Sioux Reservation is diminished to the extent of the surplus lands sold through the 1894 Act. Diminishment ordinarily suggests a shrinking of the land mass reserved to the tribe, with a clear demarcation between the land removed from reservation status, and the land retained in reservation status. *See, e.g., Rosebud,* 430 U.S. at 606-615, 97 S.Ct. at 1373-1377 (holding that congressional acts diminished boundaries of Rosebud Reservation by removing from reservation land situated in four counties of South Dakota).

Such a clear demarcation is not present here, where the Yankton Sioux allotments purposely were interspersed over the entire 1858 reservation to help ensure that the Indians would live closely with the whites who settled on the intermingled ceded lands and thereby assimilate into white culture. The Supreme Court recognized that diminishment ordinarily

affects the placement of reservation boundaries, *see Yankton Sioux Tribe,* 522 U.S. 329, ___, ___, 118 S.Ct. at 798, 799, 800, 139 L.Ed.2d 773, but nowhere in its opinion did the Supreme Court explain how the Yankton Sioux Reservation boundaries changed as a result of the diminishment. The court stopped short of holding the Yankton Sioux Reservation terminated or disestablished as it could have done if it thought *DeCoteau* was controlling, *id.* 522 U.S. 329, 118 S.Ct. at 805, and instead signaled at points in its opinion that perhaps the reservation is not disestablished. *Id.* 522 U.S. 329, 118 S.Ct. at 801, 805. The Supreme Court spoke of Congress intending by the 1894 Act "to modify the reservation," *id.* 522 U.S. 329, 118 S.Ct. at 798, or to work "a reconception of the reservation[.]" *Id.* 522 U.S. 329, 118 S.Ct. at 802. The Supreme Court did not elaborate upon how such a modified or reconceived reservation should be envisioned. If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion, then the Supreme Court has effectively created within those boundaries an "'impractical pattern of checkerboard jurisdiction,'" a result which the Supreme Court in the past has disfavored as contrary to the approach preferred by Congress and codified at 18 U.S.C. § 1151, to avoid jurisdictional confusion. *See Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 478, 96 S.Ct. 1634, 1643-44, 48 L.Ed.2d 96 (1976) (quoted case omitted); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 358, 82 S.Ct. 424, 428-29, 7 L.Ed.2d 346 (1962). Because the Supreme Court has not explained how

the diminishment affected reservation boundaries, this Court "cannot assume that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk,* 565 F.2d 1032, 1039 (8th Cir.1977).

The Tenth Circuit confronted an identical boundary problem following the Supreme Court's diminishment decision in *Hagen. See Ute Indian Tribe of Uintah and Ouray Reservation v. Utah,* 114 F.3d 1513 (10th Cir.1997), *cert. denied sub nom. Duchesne County v. Ute Indian Tribe of Uintah and Ouray Reservation,* 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). The *Hagen* decision, which affirmed a judgment of the Utah Supreme Court, directly conflicted with a prior en banc decision of the Tenth Circuit that the Uintah Valley Reservation was not diminished or disestablished. After *Hagen,* the Tenth Circuit recalled its mandate and modified its previous decision only to the extent necessary to reconcile the opinion with *Hagen. Ute Indian Tribe,* 114 F.3d at 1528. The Tenth Circuit held, consistently with *Hagen,* that Acts of Congress between 1902 and 1905 diminished the reservation to the extent of the unallotted lands that were opened to non-Indian settlement, but that the Acts did not entirely disestablish the reservation. *Id.* The court concluded that the original exterior reservation boundaries remained intact and that all lands originally allotted to tribal members remained within the limits of the

reservation and constituted Indian country under 18 U.S.C. § 1151(a), even though a substantial portion of those allotted lands had passed into fee status after 1905. *Id.* 114 F.3d at 1529-30. When given the opportunity to grant a petition for certiorari and review the Tenth Circuit's decision, the Supreme Court declined and denied the petition for a writ of certiorari.

The disestablishment question now before this Court closely mirrors the issue before the Tenth Circuit in *Ute Indian Tribe,* and the Court draws some guidance from that opinion. But each agreement with an Indian tribe is different and must be evaluated in light of all the circumstances attendant to its making. *Hagen,* 510 U.S. at 410-13, 114 S.Ct. at 965-66. Thus, the Court begins its analysis from the familiar legal premise that Congress created the Yankton Sioux Reservation in the 1858 Treaty, and only Congress can eliminate it by explicitly indicating its intent to do so. *See Solem v. Bartlett,* 465 U.S. 463, 470, 104 S.Ct. 1161, 1166, 79 L.Ed.2d 443 (1984). The Supreme Court "does not lightly conclude that an Indian reservation has been terminated," *DeCoteau,* 420 U.S. at 443, 95 S.Ct. at 1092, and this Court likewise will not lightly reach such a determination. Once Congress has established a reservation, all tracts included within it are a part of the reservation until separated from it by Congress. *Id.,* 420 U.S. at 443, 95 S.Ct. at 1092-93. The 1894 Act of Congress which opened the Yankton Sioux Reservation to allow non-Indians to purchase land and settle there and which, according to the Supreme Court, diminished

the size of the reservation only to the extent of the ceded lands, is not inconsistent with the preservation of the 1858 Treaty boundaries. *See Solem,* 465 U.S. at 470, 104 S.Ct. at 1166; *DeCoteau,* 420 U.S. at 444, 95 S.Ct. at 1093. Ambiguities must be resolved in favor of the Yankton Sioux, *see Hagen,* 510 U.S. at 411, 114 S.Ct. at 965, and the Supreme Court "requires that the 'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" *DeCoteau,* 420 U.S. at 444, 95 S.Ct. at 1093. Thus, to follow the disestablishment inquiry as defined in *DeCoteau,* the Court must consider the language of the 1894 ratification statute and the 1892 Agreement it incorporated, as well as the legislative history of the Act, and the surrounding historical circumstances.[4]

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[4] While one might reason that subsequent acts of Congress should be examined to see if they shed any light on the meaning of the 1894 Act, the Supreme Court disapproves of such an approach, noting that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 803, 139 L.Ed.2d 773 (quoted case omitted). It appears, moreover, that the Supreme Court similarly eschews giving weight to evidence explaining the actions of the President and the executive departments in implementing the intent of Congress or to evidence showing the understanding of non-government parties. In reaching its decision that the Yankton Sioux Reservation is diminished, the Supreme Court summarily dismissed "the scores of administrative documents and maps marshaled by the parties to support or contradict diminishment" because such evidence had "limited interpretative value." *Id.* 522 U.S. 329, 118 S.Ct. at

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The Court believes it is helpful to begin with the historical circumstances surrounding the making of the 1892 Agreement as documented in the reports of the Yankton Indian Commission. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 48-97 (1894); (Pl. Ex. 5.) (hereafter "Negotiations".) These detailed reports provide clear insight into the mindset of the Commissioners and the Yankton Sioux as they negotiated for the sale of the surplus lands. These reports were included in the legislative history of the 1894 Act ratifying the 1892 Agreement, and the Senate and House Reports forwarding the Act from the Committees on Indian Affairs to the floor called special attention to the report of the Yankton Sioux Commission and all of their proceedings. S. Rep. No. 196, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894) (Pl. Ex. 7); H. Rep. No. 570, Committee on Indian Affairs, 53rd Cong., 2d Sess. at 1 (1894). (Pl. Ex. 8.)

A. The Reports of the Yankton Indian Commission

The Commissioners held ten councils which were attended by the Indian Committee of 24 named to

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803-04 Rather, for the foundation of its decision, the Supreme Court relied upon the "strong textual and contemporaneous evidence" to find diminishment *Id.* 522 U S. at ___, 118 S.Ct at 804. This Court likewise focuses upon the strong textual and contemporaneous evidence surrounding the 1894 Act and the making of the 1892 Agreement to determine that the Yankton Sioux Reservation was not disestablished.

represent the Yankton Sioux Tribe, the ten moderators, the chiefs, the head men, and varying numbers of members of the Tribe. The first two of the ten councils occurred on October 8th and 24th of 1892, and the remaining eight councils occurred between December 2nd and 17th of 1892. Very little, if any, discussion during the councils was directed to hammering out the terms of the twenty Articles that ultimately became the 1892 Agreement. Negotiations at 48-97. Tribal members generally spoke in favor of or in opposition to the sale of the surplus lands, expressing explicitly their perceived view of themselves as ignorant and inferior to the wiser, educated Commissioners. *Id.* at 52.[5] The Indians' speeches were laced with suspicion and distrust of the United States because of previous unhonored treaty terms, and with paramount concern for the price the United States would pay for the surplus lands. The Committee of 24 developed a list of twelve propositions, or grievances, that the Tribe wanted addressed in the agreement to sell the surplus lands. *Id.* at 52, 57. The Commissioners eventually agreed to incorporate as many of the propositions as their instructions from Washington

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[5] In deciding a dispute over the western boundary of the Yakima Indian Reservation in 1913, the Supreme Court said that its "effort must be to ascertain and execute the intention of the treaty makers, and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties." *Northern Pacific Ry Co. v United States*, 227 U.S 355, 362, 33 S Ct 368, 371, 57 L.Ed 544 (1913).

would allow. *Id.* at 60. Along the way, however, the Commissioners attempted to convince the Indians that they could not resist the tide of change, that the President and the Secretary of the Interior were their friends, that the United States had fulfilled all terms of the 1858 Treaty, that the United States would deal fairly with the Indians, and that sale of the surplus lands was in the Tribe's best interest. *Id.* at 65-69.

What is clear throughout the Commissioners' reports of their councils with the Tribe is that their mission was to obtain the sale of the surplus lands, and no more. This Court, the Eighth Circuit, and the Supreme Court each acknowledged in the previous stage of this litigation that the parties, in reaching the 1892 Agreement, did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized only the consent of the Tribe to sell the surplus lands remaining after the allotment process was completed. *Yankton Sioux Tribe,* 890 F.Supp. at 883-84; *Yankton Sioux Tribe,* 99 F.3d at 1453; *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 795. If the Commissioners had intended to terminate the reservation and communicated that to the Indians, that would have made their mission even more difficult.

Comments made by the Commissioners during the councils with the Yankton Sioux support the conclusion that the Commissioners and the Tribe did not perceive their work as causing a complete disestablishment of the reservation. In his earliest comments during the first council with the Tribe,

Commissioner Adams stated, "We understand that you each received an allotment of land on which to make a home. . . . we also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." Negotiations at 48. Although these comments immediately bring to mind the Dawes Act and the policies behind it, what Commissioner Adams had to say to the Tribe just a few moments later is striking. He said: "It might be, after you sold your lands, you could have this reservation organized as a separate county. If this could be done – I do not say it can – you could govern your own people in your own way, so long as you obeyed the laws of the State. I do not say this can be done, but see no good reason why it might not be done." *Id.* Commissioner Adams apparently held the view that the allotment policy and tribal self-government could co-exist, and he set the tone for the negotiations by conveying such a view in his very first address to the Tribe.

Likewise, during the first council, Commissioner Cole told the Indians that the "Great White Father . . . does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever. He only wants you to sell your surplus lands for which you have no use." *Id.* at 49. Cole assured the Indians, "[y]ou not only have a home as a tribe, but every man, woman, and child among you each now has a home which no one can take away from you and the Great White Father wants you to always

keep these homes and live on them in peace and comfort like white men, and be citizens and have plenty." *Id.* Cole also remarked, "The Great Father and his Great Secretary [of the Interior], Mr. Noble, think you have acted wisely in selecting your homes in severalty. . . . They have sent us here to buy these surplus lands for homes for white men who will settle among you; who will live peaceably and neighborly with you; who will cultivate these surplus lands and make your allotted lands much more valuable." *Id.* at 50. In response to the statements of Adams and Cole, Henry Stricker replied, "if you will help us we hope we will make a treaty that will be beneficial to us as a tribe." *Id.*

At the second council, the tribal members asked to see the form contract held by the Commissioners, which was produced. Remarkably, a question arose whether the tribal members would be permitted to make comments about the provisions contained in the form agreement, and this apparently generated extensive discussion. The Commissioners reported to Congress that "[i]t was finally agreed that [the agreement] should be translated to the council and such comments as may be made by any of the committee of 24, could not, and should not be considered final." *Id.* at 51. The contract was then read article by article through oral translation into the Dakota language and, at the Tribe's request, the contract was also translated in a written form for use and consideration by the Committee of 24. *Id.* With that, the council ended.

In the series of eight councils that occurred during the sixteen-day period from December 2 to December 17, 1892, more comments were made suggesting that the Commissioners and the tribal members thought the intent of the "Great White Father" was to open the reservation for settlement rather than to disestablish it. Robert Clarkson, a member of the Tribe, said, "White men see our surplus lands every day traveling through it. They have a lawyer sent to Congress to open this reservation and surplus land." *Id.* at 61. Commissioner Brown acknowledged that the 1858 Treaty "set aside for your people a reservation with certain boundaries[,]" which was supposed to contain 400,000 acres. *Id.* at 66. He admonished the Tribe to consider that, when the reservation was surveyed, it actually contained 430,495 acres, "more than the Government agreed to let you have." *Id.* He assured the Indians that "schoolhouses will be put up all over the agency[.]" *Id.* at 67.

To convince the Indians that the strong federal government was looking out for the interests of the poorer Tribe, Commissioner Brown gave as an example two Indians, one strong and well-looking, and one half-starved, asking the Commissioners to divide a piece of beef between them. He said "it would be natural and right to give the one who was sick more than the other . . . and if we make this treaty we want to give you the biggest half." *Id.* at 67. Commissioner Cole named as the "principal object of the treaty" to make both the allotted and the surplus

lands valuable, *id.* at 68, and explained potential differences in income to tribal members, to be derived primarily from land rent, "after the surplus lands have been occupied by white people." *Id.* at 69. A dominant theme of the Commissioners was that the government wanted the Indians to live close to the white settlers so that the Indians could emulate the non-Indians, *see id.* at 71-72, but the reason given was not the government's desire to eliminate the reservation. Rather, the Commissioners reminded the Indians that, with the loss of wild game and a declining ability to roam and hunt as in the past, the Indians needed to adapt to the changed conditions around them, and to learn to obtain their food, clothing, and income like white men. *Id.* at 71-72.

Commissioner Adams instructed the Indians as to how they might rent the uncultivated portions of their allotments to white men to generate cash income, using as an example his personal experience at the Sissetons' reservation. *Id.* at 72-73. The Commissioners had already told the Yanktons that the $2.50 per acre that the United States paid the Sisseton-Wahpeton Sioux Tribe for the surplus lands on the Lake Traverse Reservation in 1891, the year before, was the highest price Congress had ever paid for surplus Indian lands. *Id.* at 68. Despite the Sissetons' sale of all of their surplus lands, Commissioner Adams viewed the Lake Traverse Reservation as still in existence:

> Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from

> the line of the Sisseton. Right here lives a friend of mine by the name of Vick, just outside the reservation line. Just inside of the line of the reservation lives an Indian friend of mine by the name of Chunek. He has land which has plenty of grass upon it. Vick asked Chunek to let him cut grass on his land. He agreed to and Vick was to pay 50 cents per ton for all he cut. This man cut 150 tons of hay and paid Chunek $75 for it. Chunek did not do anything but lie in the grass and see others work and got $75. It was just as if Chunek had gone out into the middle of the road and picked it up. Now, my friends, what made the grass on Chunek's farm worth money? Because his tribe had sold their surplus land and he had become a citizen of the United States and could rent his land. This he could not do until the surplus land was sold to the Government. If this Indian can do this why cannot you?

Id. at 72. Considering these remarks, and this Commissioner's earlier comments that it might be possible to "have this reservation organized as a separate county[,]" and "you could govern your own people in your own way, so long as you obeyed the laws of the State[,]" the Yankton Sioux reasonably could have concluded that, as a result of the sale of their surplus lands, the "Great Father" would, in time, make them citizens of both the State of South Dakota and the United States, and yet permit them to continue to govern themselves as a Tribe on the allotted lands.

Despite all of the efforts of the Commissioners, during the council on December 10, 1892, some tribal members reported the Indians had stayed up night and day debating the matter, but had decided not to sell their surplus lands. *Id.* at 73. Other tribal members disagreed, saying the Tribe was willing to sell, but the only disagreement was price. Commissioner Cole became adamant:

> Now, I want you to understand that you are absolutely dependent upon the Great Father today for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.
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> * * *
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> [The Great Father] did not send this commission until every one of you, down to the smallest baby, *has a home of their own on this reservation.*

Id. at 74-75 (emphasis added). From this speech and the fact that the Yanktons had lived on family allotments on the reservation for thirty-three years, the Yanktons could, and most probably did, draw the conclusion that their individually allotted lands remained in reservation status, but that the continuation of their annuities and all other forms of federal financial assistance depended upon their agreement to sell the surplus lands. Yankton Agent Foster then spoke in favor of the Agreement, but advised the Tribe not to settle on the price. *Id.* at 75. Felix Brunot called for a vote, which caused confusion and wrangling among the factions of the Tribe favoring and opposing the sale. *Id.* at 76. Commissioner Cole refused to recognize any vote because less than a majority of the adult male members of the Tribe were present. *Id.*

At the next council, the Commissioners asked the Committee of 24 to designate six individuals, representing the factions in the Tribe, to meet with the Commission to draft a treaty. *Id.* at 76-77. This proposal also met with disagreement because tribal members believed the Commission refused to recognize the stated decision of the Committee of 24, representing the Tribe, not to sell the surplus lands. *Id.* at 78. Cole defended his proposal of a subcommittee as necessary to work out the small details. The friends of the treaty appointed three members to the proposed subcommittee, but the opposition understandably did not present any members for such service. *Id.* at 78, 81.

In the last council, on December 17, 1892, Commissioner Brown resigned to eliminate any possibility that he was the cause of the Tribe's refusal to sell the surplus lands, as he had heard rumors that he was to blame. *Id.* at 79. Commissioner Cole then eloquently addressed the Tribe:

> This reservation alone proclaims the old time and the old conditions. But even here the means of your former mode of life have vanquished. The tide of civilization is as resistless as the tide of the ocean, and you have no choice but to accept it and live according to its methods or be destroyed by it. *To accept it requires the sale of these surplus lands and the opening of this reservation to white settlement.*

Id. at 81 (emphasis added). The council adjourned, and approximately two weeks later, on December 31, 1892, the Commissioners announced their completion of an Agreement for the sale of the surplus lands, after their consultation with the chiefs and head men and the white missionaries considered to be friends of the Tribe. *Id.* at 83-84.

At no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation. At no point in the Commissioners' reports is there any mention of a transfer of the Yanktons' tribal sovereignty to the United States or the State of South Dakota.

On January 3, 1893, missionary John Williamson sent a letter to Commissioner Cole, stating that he thought the terms were the most liberal the Indians would get, that he had no doubt the provisions would be faithfully carried out, and "further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858." *Id.* at 84. Joseph Cook, the Episcopal missionary, concurred with Williamson that the Agreement was advantageous for the Tribe. *Id.* A draft of the Agreement was sent to Secretary of the Interior Noble in January 1893, and his minor suggested changes were made. *Id.*

There is no indication in the Commissioners' reports that the Yanktons reached a consensus to support the Agreement. To the contrary, the Commissioners' reports in early 1893 describe vehement opposition to the Agreement and hardships the Commissioners faced in obtaining signatures to the Agreement by the majority of the adult male members of the Tribe. *Id.* at 85-97. Councils were held to read the Agreement to the tribal members, and the Commissioners waited day after day for tribal members to come to them and sign the Agreement. The Commissioners traveled across the reservation looking for elderly and infirm signatories, and even crossed into Nebraska to take the signatures of Yankton soldiers who were not present on the Yankton Sioux Reservation during the negotiations. *Id.* at 92-93. By March of 1893, the Commissioners obtained a sufficient number of signatures – 255 of the 458

members eligible to sign – and the Commission departed for Washington. *Id.* at 21, 97.

Two federal investigators were sent separately to the Yankton Sioux Reservation in 1893 to investigate allegations of fraud in the procurement of signatures on the Agreement. Indian Inspector John W. Cadman reported in November 1893 that he had uncovered only one incident of possible undue influence, but that he did not believe such had occurred in that case. He also reported that some tribal members who had signed the Agreement wished to change their minds, while others wished to sign the Agreement for the first time. *Id.* at 35. Special Agent Cooper also found no evidence of coercion by the Commissioners in reaching the Agreement. *Id.* at 95.

The Report of the Commissioner of Indian Affairs dated September 16, 1893 (Pl. Ex. 10), written before Congress ratified the 1892 Agreement, stated the Indians had "not signified their assent that such reservation might be embraced within the Territory of Dakota or State of South Dakota[,]" and further,

> Notwithstanding that all the Indians have accepted allotments and land patents have been issued to many of them for their lands, yet their relationship with local State authorities has not changed. The reservation has been within an organized county for many years, yet the county authorities decline to recognize the Indians or any of the residents of the reserve as entitled to the rights and privileges of citizenship. The

> constitution of the State of South Dakota expressly disclaims any right or title to any lands owned or held by an Indian or Indian tribe and are exempt from taxation, and this is held to disclaim any jurisdiction over the tribe, either civil or criminal, of the residents within an Indian country.
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> * * *
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> It is clear, then, that the United States exercises sole and exclusive jurisdiction over the reservation except in so far as it may see fit to grant the State the right to exercise its jurisdiction.

B. The Language of the 1892 Agreement and the Legislative History of the 1894 Ratifying Act

The entire 1892 Agreement and its preamble were incorporated into the 1894 ratifying statute. (Pl. Ex. 2, hereafter "Act".) Congress stated in the Act that it "accepted, ratified, and confirmed" the 1892 Agreement and:

> [t]hat the lands by said agreement ceded to the United States shall, upon proclamation by the President, be *opened to settlement,* and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota[.]

Act at 6 (emphasis added). Congress' statement that the ceded lands shall be "opened to settlement" is ambiguous in that it does not make clear whether the Yankton Sioux Reservation is disestablished or whether the Reservation is diminished only to the extent of the ceded lands. Where there is an ambiguity in a statute, a preamble can be utilized to help discern the intent of Congress. *See Jurgensen v. Fairfax County,* 745 F.2d 868, 885 (4th Cir.1984). The preamble to the 1892 Agreement cited the 1892 appropriations act authorizing the Secretary of the Interior "to negotiate with any Indians for the *surrender of portions of their respective reservations,* any agreement thus negotiated being subject to subsequent ratification by Congress[.]" Act at 1 (emphasis added). The preamble also recited that the Yankton Sioux Tribe "is willing to *dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty eight (1858),* between said tribe and the United States, and situated in the State of South Dakota[.]" Act at 1 (emphasis added). The emphasized portions of the preamble clearly indicate congressional intent to accept the will of the Yankton Sioux Tribe to cede only a portion of the reservation established by the 1858 Treaty. Similarly, in *Solem,* 465 U.S. at 472-74, 104 S.Ct. at 1167-68, the Supreme Court concluded that the phrase "sell and dispose" indicated congressional intent to maintain existing reservation boundaries of the Cheyenne Reservation in South Dakota. Thus, the language of the 1894 Act

of Congress contradicts any suggestion that the Yankton Sioux Reservation is disestablished.

Congress added the provision about reserving the sixteenth and thirty-sixth sections for common school purposes. The Supreme Court interpreted similar language in the Rosebud Acts as intended by Congress to conform them to the enabling legislation which admitted the State of South Dakota into the Union, and reasoned that Congress thereby intended to diminish the Rosebud Reservation. 25 Stat. 679 (1889); *Rosebud Sioux Tribe,* 430 U.S. at 599-601, 97 S.Ct. at 1369-70. In *Yankton Sioux Tribe,* the Supreme Court recognized the State's position, relying on *Rosebud,* that the school sections clause indicated a view that Congress meant to extinguish the reservation status of the ceded lands, 522 U.S. at ___, 118 S.Ct. at 801, but, referring to Article VIII, not Article VII, the Supreme Court concluded that " . . . a somewhat contradictory provision counsels against finding the reservation terminated." The Supreme Court cited its earlier conclusion in *DeCoteau* that the school sections clause implied nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands, and the Supreme Court did not consider at all the effect of the school sections clause on the allotted, unceded lands. In *DeCoteau,* where the Lake Traverse Reservation was held to be disestablished, the Supreme Court dismissed the school sections clause in a footnote as irrelevant to the dispute before the Court. *DeCoteau,* 420 U.S. at 444 n. 33, 95 S.Ct. at 1093 n. 33. The

Supreme Co rt observed that the clause was not part of the agreement sent to Congress for ratification, there was no indication Congress added the clause with the intent to qualify the terms of the cession agreement, and it was Congress' usual practice to include the clause in "opening public lands to settlement[.]" *Id.*

This Court concludes that the school sections clause is equally irrelevant here, as it was in *DeCoteau*, but even if the clause is deemed relevant, a probable interpretation of it is that Congress wanted to be sure common schools would be available for all residents, Indian and non-Indian, in the opened, assimilated Yankton Sioux Reservation. If Congress had intended to disestablish the Yankton Sioux Reservation, the common school sections would have been subject to state law in any event and such language would have been wholly unnecessary.

Nothing in the explicit language of the 1892 Agreement supports disestablishment of the Reservation. The first two Articles, which were the focus of the previous *Yankton Sioux* cases, ceded to the United States the surplus lands for a sum certain and diminished the size of the Reservation. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 798, 139 L.Ed.2d 773. Articles III, IV, and VI pertained to the method of payment to the Tribe of the principal and interest received upon the sale of the surplus lands, and those Articles do not shed any light on the disestablishment issue.

Many of the remaining Articles of the 1892 Agreement also do not further the disestablishment analysis. They provided for gifts of $20 gold pieces to males of the Tribe, Article VII; permitted leasing of uncultivated allotted land, Article IX; permitted religious societies to continue working among the Indians, Article X; prohibited payment of the land purchase price to the Indians to settle claims prior to the Agreement, Article XII; fixed the status of mixed bloods, Article XIII; prohibited Congress from alienating the allotments from the Indians before sale of the surplus lands to settlers, Article XIV; settled the claims of the Yankton scouts and the Tribe's claim to the Pipestone Reservation, Articles XV and XVI; provided for placement of a copy of the Agreement in the Yanktons' "Agreement Book," Article XIX; and bound both parties upon ratification by Congress, Article XX. Consequently, these Articles will not be discussed in any detail.

1. Article V

Article V provided for the set aside and use of the interest on the land purchase price to continue funding services for the Yanktons' most helpless members, for schools and educational purposes, and "for courts of justice and other local institutions for the benefit of said tribe[.]" The evidentiary record before the Court establishes that, years before the 1892 Agreement, Congress authorized the creation of an Indian police force and a Court of Indian Offenses on the Yankton Sioux Reservation, and that such a police force and a

Court of Indian Offenses operated to govern tribal affairs at the time of the ratification. H. Hoover, *Yankton Tribal Police and Court of Indian Offenses, 1859-1943* (1998). (Gov't.Ex. 16.) Article V's provision for continued funding of these and "other local institutions" signals congressional intent consistent with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government within the 1858 boundaries on the allotted lands.

Section 2 of Article V solidified the understanding of the Yanktons and the Congress, consistent with the Dawes Act, that the Yanktons' land patents would be held in trust for twenty-five years, and at the end of that trust period, the Yanktons would receive from the United States a complete title to their allotted lands, and would then assume all the duties and responsibilities of citizenship. Such language indicates a congressional intent that there would be an ongoing relationship between the Yanktons and the federal government during the twenty-five year assimilation period. Because the Yanktons were not to receive patents in fee immediately, the Yanktons continued to live on land that was essentially retained in reservation status but apportioned to them individually. Such an interpretation is supported by evidence in the record showing that three U.S. Presidents – Woodrow Wilson, Calvin Coolidge, and Herbert Hoover – extended by Executive Order the trust period on certain of the allotted lands, and in each Executive Order, the President explicitly referred to

"the trust period on the allotments of Indians *on the Yankton Sioux Reservation*[.]" (Gov't. Exs. 10-12.)

Acts of Congress subsequent to the 1894 Act, such as the Burke Act of 1906, facilitated the alienation of a substantial number of Indian allotments to non-Indians by 1913, through such means as allowing the Secretary of the Interior to grant patents in fee to certain "competent" Indians prior to the expiration of the trust period and through sales of heirship lands. (Pl. Exs. 21-22; Pl. Ex. 2, 1892 Agreement, Article XI.) These sales of allotments were not always the result of arms-length negotiation. The allegations of a 1921 complaint brought by the United States on its own behalf and as guardian of certain Yankton Indians and their heirs indicates that the federal government viewed the Yankton Reservation as still in existence and gives insight into the federal government's concerns about the means by which sales of allotments were obtained. *United States v. Caster,* 271 F. 615 (8th Cir.), *appeal dismissed,* 257 U.S. 666, 42 S.Ct. 93, 66 L.Ed. 425 (1921).

The United States brought the action for the purpose of obtaining a decree adjudging the United States to be the owner of the allotted lands at issue, subject to the rights of the allottees, and for the cancellation of all conveyances of the lands made by the Indian allottees to the non-Indian defendants. *Id.* 271 F. at 616. The lands in question had been allotted under section 5 of the Dawes Act of 1887, to be held in trust for twenty-five years. *Id.* On April 20, 1916, the President of the United States by Executive Order

extended the trust period for ten more years as to the allotted lands at issue. *Id.*

The complaint alleged that, to assist the Secretary of the Interior in exercising his authority under the Burke Act of 1906, the Secretary appointed a three person commission, which included "A. W. Leech, Superintendent of the Yankton Reservation," and directed the commission to investigate the competency and capability of the "Indian allottees residing on the Yankton Reservation to manage and control their property." *Id.* After investigation, the commission submitted reports to the Secretary representing that a number of Indians, including the allottees at issue, were competent to manage and control their own affairs and recommending that the Secretary issue to them patents in fee for their allotments. *Id.* In reliance on the reports, the Secretary prepared the patents in fee, the President signed them, as did the Recorder of the United States General Land Office, and they were recorded in the appropriate books in the General Land Office. *Id.*

The complaint further alleged that the Secretary of the Interior decided to deliver the patents in fee in person. Upon his arrival in Greenwood, South Dakota, on May 12, 1916, the Secretary

> learned that he had been grossly misled as to the competency of such allottees; that they were palpably incompetent to manage and control their respective properties and were not qualified to receive patents in fee; that, while such allottees had been represented to

> him as competent, some of them were wholly untutored, and each and all of them were without business experience, were incapable of protecting his or her property, or of appreciating its true value, and were easily imposed upon by the craft and design of their more astute white neighbors; and that certain of them . . . before the execution of their respective fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, had been unlawfully, secretly, and surreptitiously imposed upon by white men, and had entered into secret and unlawful agreements for the sale and disposition of their several allotments and had otherwise been duped and defrauded in relation thereto.

Id. 271 F. at 617. The Secretary of the Interior refused to deliver the patents in fee, took them back to Washington, and ordered them to be marked, "'Canceled.'" *Id.* The complaint alleged that the commissioners had likewise been misled in their investigation. *Id.*

Relying upon *United States v. Schurz,* 102 U.S. 378, 12 Otto 378, 26 L.Ed. 167 (1880), the Eighth Circuit held that the title of the United States to the lands in controversy was divested at the time of the execution and recording of the patents in fee, that delivery of the patents by the Secretary to the allottees was not necessary to transfer title, and that the title remained in the allottees, notwithstanding the Secretary's attempt to cancel the patents in fee.

Id. 271 F. at 619. The court ultimately held that the complaint failed to allege a cause of action because there was no claim of a mistake of law, but only a mistake of fact, and the allegations of fraud were too general because the complaint did not identify who made the misrepresentations to the commissioners and what the misrepresentations were. *Id.* 271 F. at 620. The record in this case reflects that similar practices occurred through the 1920's such that Indian land holdings drastically declined until Congress passed the Indian Reorganization Act in 1934. 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.*

As mentioned earlier in this opinion, however, the actions of Congresses after the 1894 Act, which allowed the sales of Indian allotments before the trust period ended, "form a hazardous basis for inferring the intent of an earlier [Congress]." *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 803, 139 L.Ed.2d 773. Congressional intent not to disestablish the Yankton Sioux Reservation is clear from the 1894 Act, the 1892 Agreement and the surrounding contemporaneous historical circumstances. The acts of Congress in later years cannot be bootstrapped to the 1894 Act to determine the intent of the 53rd Congress when it ratified the 1892 Agreement.

Even if miscellaneous, subsequent legislation is relevant to show the ultimate consequences of the allotment policy initiated by the Dawes Act, no party or amicus curiae to this consolidated litigation has identified a specific, subsequent act of Congress that

expressly and unequivocally disestablished the Yankton Sioux Reservation. By 1934, Congress recognized the utter failure of its allotment policy and the role it played in forcing the Indian tribes into greater poverty and social destruction. That year, Congress passed the Indian Reorganization Act, which again placed primary focus upon reservations in Indian land policy, permitted the exchange of lands held by Indians and non-Indians within reservations in an effort to consolidate tribal lands, and extended indefinitely the trust period on allotted lands.

Since the 1894 Act, Congress has continued to refer to the Yankton Sioux Reservation as a continuing entity, even though the record is replete with contradictory references by federal, state, and county officials and citizens. *See* 41 Stat. 1468 (1920) (authorizing Secretary of Interior to convey to trustees of Yankton Agency Presbyterian Church, by patent in fee, premises situated *within the Yankton Indian Reservation,* county of Charles Mix, State of South Dakota); 47 Stat. 300 (1932) (dividing the United States District Court for the District of South Dakota into four divisions, and providing that "[t]he territory embraced . . . in the counties of Aurora, Beadle, . . . Charles Mix, . . . Yankton, and *in the Yankton Indian Reservation,* shall constitute the southern division of said district."); Reclamation Projects Authorization and Adjustment Act of 1992, Pub.L. No. 102-575 2005(b) (1992) (approving water project to "irrigate not more than approximately three thousand acres of *Indian-owned land in the Yankton-Sioux Indian*

Reservation . . . "). These statutory references, if relevant to the disestablishment question at all, certainly must be construed in favor of the Yankton Sioux Tribe. As the Supreme Court recognized, "the allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands." *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 805. Repeated congressional recognition in statute of an existing Yankton Sioux Reservation compels this Court to do nothing other than effectuate the "present-day understanding of a 'government-to-government relationship between the United States and [the Yankton Sioux Tribe][.]' " *Id.*

2. Article VIII

The Supreme Court characterized Article VIII of the 1892 Agreement, erroneously denominated Article VII in its opinion, as a provision that "counsels against finding the reservation terminated." *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 801, 139 L.Ed.2d 773. Article VIII reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" until "they are no longer required for such purposes." Act at 3. The Supreme Court observed that in *Solem* it had said "with respect to virtually identical language" that " '[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of

the reservation.'" *Id.* (quoting *Solem*, 465 U.S. at 474, 104 S.Ct. at 1168).[6] The Supreme Court provided no further analysis of this Article VIII issue, but immediately proceeded to discuss a different Article of the Agreement. Article VIII must nonetheless have continued to trouble the court, for in closing the opinion, it identified "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common," that cautioned it to limit its holding to the narrow issue of diminishment. *Id.* at 805. The court said it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly [we] decline to do so. Our holding in *Hagen* was similarly limited, as was the State Supreme Court's description of the Yankton

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[6] Article VIII also provided that, upon ratification, all ceded lands would be offered for sale through the proper land office, "to be disposed of under the existing land laws of the United States, to actual and bona fida settlers only" It is interesting to note that an Armour, South Dakota, bank official, Homer Johnson, wrote to the Secretary of the Interior in 1895, shortly before the Presidential Proclamation opening the lands to settlement, complaining that the State of South Dakota was attempting to file claim to certain of the surplus lands in violation of Article VIII's provision that all claims were to be disposed of under the land laws of the United States Johnson reported that the South Dakota Constitution forbade the sale of state land for less than $10.00 per acre, and if the State were allowed to file claim, the lands would be unavailable to settlers indefinitely. (Pl. Ex 56.)

reservation in . . . *State v. Greger,* 559 N.W.2d [854,] 867 [(S.D.1997)]."[7] *Id.*

The Supreme Court's reference to "common ownership" by the Tribe must have referred to the Tribe's recent purchases of lands within the 1858 exterior boundaries that had at some earlier time passed from Indian allotment to non-Indian ownership. The Supreme Court would clearly have understood that it is not correct to refer to an Indian Tribe as "owning" reservation land in common because the right of Indians to their reservations was a right of use and occupancy, with the United States holding title in fee. *Spalding v. Chandler,* 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (1896). The right to use and occupancy was as sacred as the fee title of the sovereign. *United States v. Cook,* 86 U.S. 591, 19 Wall. 591, 22 L.Ed. 210 (1873).

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[7] The question of the existence of the Yankton Sioux Reservation has been presented to the South Dakota Supreme Court four times, but it appears that the issue was not fully presented by evidence until *Greger,* when the parties stipulated to incorporate the record that was before this Court in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., Greger,* 559 N.W.2d at 859 n. 5. As the Supreme Court noted, the South Dakota Supreme Court held in *Greger* that the Yankton Sioux Reservation is diminished to the extent of the ceded lands, as it did in *State v. Thompson,* 355 N.W.2d 349 (S.D. 1984) (using term "disestablished"); *State v. Williamson,* 87 S.D. 512, 211 N.W.2d 182 (1973) (same); and *Wood v. Jameson,* 81 S.D. 12, 130 N.W.2d 95 (1964) (same).

Other than the allotments reserved to the Yanktons and held in trust for twenty-five years pending patent in fee, the Yanktons did not themselves reserve in the 1892 Agreement any lands to be held in common by the Tribe, but agreed that the United States would reserve from sale to settlers some of the ceded lands to be used for agency, school and other purposes to benefit the Tribe. The reservation of lands by the United States for the benefit of the Tribe was virtually equivalent, under the law, to reservation for the use and occupancy of the Tribe.

Following ratification of the 1892 Agreement, the United States reserved 1,252.89 acres for agency, church, and school purposes pursuant to Article VIII of the Agreement.[8] (Pl. Ex. 11.) As noted by the Supreme Court, there is some acreage within the original 1858 boundaries that has reverted to commonly held tribal or trust land. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 804, 139 L.Ed.2d 773. In the late 1920's, the United States returned to the control of the Yankton Sioux Tribe some of the lands reserved in the 1892 Agreement for school purposes because they were no longer needed. (Gov't. Ex. 13.) That land, as well as other parcels the Tribe has purchased in recent years are controlled by the Tribe in common.

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[8] When the Commissioner of Indian Affairs wrote his instructions to the Yankton Commission on July 27, 1892, 852 acres had been reserved for government purposes. Instructions to the Yankton Indian Commission (reprinted in U.S. Supreme Court Joint Appendix at 99.)

The record reflects that the Tribe recently has applied to the Secretary of the Interior to take into trust certain lands purchased by the Tribe within the original 1858 exterior boundaries, and that the proceeds of the Fort Randall Casino owned and operated by the Tribe will facilitate the purchase of additional lands by the Tribe in the future. This evidence of tribal control of lands within the 1858 boundaries confirms what the Supreme Court suspected: Article VIII counsels against finding the reservation terminated.

3. Articles XVII and XVIII

Finally, two other Articles of the 1892 Agreement, Article XVII, the liquor provision, and Article XVIII, the savings clause, merit discussion as supporting the conclusion that a diminished reservation remained intact. Article XVII provided (emphasis added):

> No intoxicating liquors nor other intoxicants *shall ever* be sold or given away upon any of the lands by this agreement ceded and sold to the United States, *nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858,* and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

In the 1894 Act, Congress set the penalty for violation of Article XVII, which it ratified as written, at imprisonment for not more than two years and a fine of not more than $300. Act at 7. The Supreme Court agreed with the State that the most reasonable inference from the inclusion of this provision was that Congress was aware the opened, unallotted areas would, in the future, not be "Indian Country," and from this, the Supreme Court discerned an intent to diminish the reservation to the extent of the ceded lands. *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 801, 139 L.Ed.2d 773. Furthermore, the court said, the Commissioner of Indian Affairs described the provision as prohibiting "'the sale or disposition of intoxicants upon any of the lands *now* within the Yankton Reservation,' . . . indicating that the lands *would be severed from the reservation* upon ratification of the agreement." *Id.* (emphasis added). The court reaffirmed its prior implication of diminishment, but not disestablishment, of the Yankton Sioux Reservation in *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914), when it said in *Yankton Sioux Tribe* that Article XVII applied to ceded lands formerly included in the Yankton Sioux Reservation. *Id.* Thus, the Supreme Court itself noted a jurisdictional distinction between the ceded lands, which were severed from the reservation, and the allotted lands, which remained in reservation status.

The inclusion of Article XVII in the 1892 Agreement supports the view that the reservation was not

disestablished. Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892. 27 Stat. 260. The Yankton Commissioners conducted the negotiations with the Yankton Sioux for the sale of surplus lands shortly thereafter in the fall of 1892, and there is no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached. The liquor provision was included in the list of propositions presented by the Tribe, and Article XVII as drafted and ratified prohibited liquor forever upon the ceded lands *and* upon "any other lands within or comprising the reservations of the Yankton Sioux." Had Congress intended to disestablish the reservation, Congress would have wanted to make clear that the 1892 liquor law did not apply to the Indian allotments or the ceded lands, as neither would remain "Indian Country" if the reservation were disestablished. Congress instead ratified Article XVII, and by approving the Article, evidenced its intent to preserve the reservation status of the allotted lands.

In 1916, the Eighth Circuit considered an appeal from a federal criminal conviction for the sale of intoxicating liquor on the lands *ceded* by the 1894 Act. *Cihak v. United States*, 232 F. 551 (8th Cir.1916). The appeals court cited Article XVII of the 1892 Agreement as the basis for the federal prosecution, noting that the defendant "was indicted, tried, convicted, and sentenced for selling intoxicating liquors *upon the portion of this reservation ceded to the United States.*" *Id.* 232 F. at 552 (emphasis added).

The court reversed for a new trial only because of evidentiary error. *Id.* 232 F. at 554-55. Thus, even in 1916, the Eighth Circuit recognized that the Yankton Sioux Reservation existed and that only a portion of it had been ceded. After 1894, there was not an act of Congress that changed the reservation status of the allotted lands, and state or private conduct directed to the lands in question is not sufficient to cause such a change. *See Seymour,* 368 U.S. at 354, 82 S.Ct. at 426.

Article XVIII, the savings clause, was the fulcrum of the previous *Yankton Sioux Tribe* litigation. Despite the fact that the first sentence of Article XVIII expressly stated the non-abrogation of the 1858 Treaty and the second sentence recognized the continuing "full force and effect" of the 1858 Treaty, the Supreme Court rejected the view of this Court and the Eighth Circuit that the savings clause existed for any other reason than to assure the Yanktons that they would continue to receive their annuities under the 1858 Treaty. *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 800, 139 L.Ed.2d 773. The Supreme Court also ruled, in rejecting an argument of the United States, that it was not persuaded to "view the savings clause *as an agreement to maintain exclusive tribal governance within the original reservation boundaries.*" *Id.* 522 U.S. at ___, 118 S.Ct. at 800 (emphasis added). Having reached the conclusion that Articles I and II of the Agreement were precisely suited to terminating reservation status of the ceded lands, it makes sense that the Supreme Court would

not interpret the savings clause as an agreement to maintain the Tribe's *exclusive* tribal governance *over the ceded lands*. The court did not comment at all upon whether it would interpret the savings clause as an agreement to maintain tribal governance over the allotted lands within the original reservation boundaries. This Court concludes that the savings clause, even if limited only to the matter of preserving the Tribe's annuities under the 1858 Treaty, creates an inference that Congress contemplated that the Tribe would continue as a political entity even after the ratification of the 1892 Agreement, that its members would continue to receive the annuity benefits promised them for fifty years under the 1858 Treaty, and that tribal self-governance during the trust period was consistent with the continuation of reservation status of the allotted lands.

4. The Legislative History

Much of the legislative history of the 1894 Act already has been discussed. S. Exec. Doc. No. 27, 53rd Cong., 2d Sess. at 26 (1894); (Pl. Ex. 5.) (hereafter "Legislative History"). The letters of Secretary of the Interior Hoke Smith and Acting Commissioner of Indian Affairs Frank C. Armstrong transmitting the Agreement to Congress contain no indications that the Agreement expressly disestablished the reservation or that they had any reason to believe that disestablishment would occur. To the contrary, Acting Commissioner Armstrong flatly told Congress that the "treaty makes no provision regarding the cession

or relinquishment of the reservation or any portion thereof." Legislative History at 5. Thus, Congress knew, both from Armstrong's statement and from the extensive reports of the Yankton Commissioners, that the Yanktons had not expressly consented to the relinquishment of their entire reservation, and as already shown, Congress accepted and ratified that position in the 1894 Act.

Without doubt, parts of the legislative history suggest that Congress believed the allotment of land in severalty to individual Indians would curtail "[o]ne of the greatest hindrances to the progress of these people[, which] has been their tribal mode of life and ownership of land in common, and the issue of food and clothing [given] to them by the Government." By providing "each member of the tribe a home in his own right[,]" and bringing in the "frugal, moral, and industrious" white settlers to work beside the Indians, Congress hoped to "stimulate individual effort and make their progress much more rapid than before." (Pl. Ex. 7, State Ex. 608.) Such sentiments echo the resolution of Senator Dawes and the Forty-Ninth Congress of 1887 to assimilate the Yanktons into white culture, but these comments are passing references, and they do not overcome the strong textual and contemporaneous evidence set out in this opinion establishing that the Yanktons' allotted lands retained reservation status.

III. Treatment of the Yankton Sioux Reservation after 1894

In *Yankton Sioux Tribe,* the Supreme Court, recognizing that the 1894 Act was "not so compelling that, standing alone, it would indicate diminishment," turned to subsequent congressional and administrative references to the reservation and demographic trends to support its conclusion that de facto diminishment had occurred. *Yankton Sioux Tribe,* 522 U.S. at ___, ___, 118 S.Ct. at 802-05. Even then, the court observed that the conflicting evidence was of limited interpretative value. *Id.,* 522 U.S. at ___, 118 S.Ct. at 804, 139 L.Ed.2d 773. In the *DeCoteau* disestablishment decision, the Supreme Court devoted only two paragraphs to mention of the jurisdictional history subsequent to the 1891 surplus land act, and focused its analysis entirely upon deciding whether a congressional intent to terminate the reservation was expressed on the face of the 1891 Act or was clear from the surrounding circumstances and legislative history. *DeCoteau,* 420 U.S. at 442-43, 95 S.Ct. at 1092. The *DeCoteau* approach is the one the Court has taken in this opinion, because *DeCoteau* does not place any emphasis on "de facto disestablishment," if there is such a thing, in a manner similar to the Supreme Court's diminishment cases.

The complete evidentiary record now before the Court contains scores of historical documents, cases, deeds, affidavits, and testimony from which no clear picture emerges as to a consistent treatment of the

Yankton Sioux Reservation following passage of the 1894 Act. From the time of the Proclamation of President Grover Cleveland in 1895 opening the ceded lands of the Yankton Sioux Reservation for white settlement until today, the question of jurisdiction has presented a complicated puzzle, and the hope of many that the Supreme Court's decision would solve the puzzle once and for all did not come to fruition.

The evidence before the Court shows that, at various times, and for different reasons, some political, some fiscal, and some racial, the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix County, and the amicus curiae municipalities have exercised jurisdiction within the original exterior boundaries of the reservation. Much of this evidence was reviewed in the Court's previous opinion in *Yankton Sioux Tribe,* 890 F.Supp. at 887-88, but more evidence was admitted in this phase of the litigation. Each political entity points to the evidence establishing its exercise of jurisdiction to support its view as to whether the reservation is disestablished or not.

Thus, the Tribe emphasizes evidence that it has in the past and today maintains a tribal police force and tribal courts, that the Tribe governs itself through a Tribal Code, and that the Yankton Sioux Constitution, as amended in 1990, claims tribal jurisdiction extending to the original exterior 1858 boundaries. (Gov't. Exs. 1-2.) The State points to its law enforcement presence, the criminal and civil

cases prosecuted in its courts, its exercise of jurisdiction over environmental matters, and the maps and various references indicating a former Yankton Sioux Reservation. Charles Mix County and the cities remind the Court of their vested interest in the lands at issue and their exercise of criminal and civil jurisdiction, including taxation. They point out that the Charles Mix county seat, as well as law enforcement and court facilities, lie on former allotted lands. They emphasize the justifiable expectations of the people living in Charles Mix County. The United States, like the State, highlights its law enforcement presence on the reservation immediately after the ratification of the 1892 Agreement and its longstanding involvement in the affairs of the Tribe.

The fact that any one of these political entities has exercised or continues to exercise any form of jurisdiction within the original exterior boundaries of the Yankton Sioux Reservation is only minimally helpful to the Court in determining whether such exercise of jurisdiction was or is proper under the law. In this opinion, the Court has reached a legal conclusion, based upon the 1892 Agreement, the text of the 1894 Act, its legislative history, and the circumstances surrounding the negotiations for the sale of surplus lands, that the reservation is not disestablished.

IV. The *DeCoteau* Result Does Not Control This Case

It is important to explain why the Court believes that the *DeCoteau* result does not control the outcome in this case. The most obvious reason is that, had *DeCoteau* controlled this case, the Supreme Court would have applied it to grant the State the relief it sought: disestablishment of the Yankton Sioux Reservation. The Supreme Court did not do so and instead signaled some concern about whether the reservation continued to exist. Throughout its opinion, the Supreme Court agreed with the broad concepts expressed in *DeCoteau,* but ultimately applied them to terminate only the reservation status of the Yanktons' ceded lands. *Yankton Sioux Tribe,* 522 U.S. at ___, 118 S.Ct. at 801.

DeCoteau is factually distinguishable from the case before the Court. In reviewing the historical context that led to the sale of all of the surplus lands in the Lake Traverse Reservation, the Supreme Court emphasized that very early on, the spokesman for the Sisseton-Wahpeton Sioux Tribe stated in the local press that "[w]e never thought to keep this reservation for our lifetime. . . . The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. . . . When the reservation is open we meet as one body. We be as one." *DeCoteau,* 420 U.S. at 433, 95 S.Ct. at 1087.

The negotiations between the Commissioners and the Sisseton-Wahpeton Tribe for the sale of the surplus lands took two weeks and the *DeCoteau* opinion does not mention any disagreement that occurred among the members of the Tribe in deciding to sell their lands or any opposition registered to the agreement at all. The Indians wished to sell outright all of their surplus lands on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres, that Congress settle their loyal scout claim, and that an adequate sales price per acre be paid for all of the unallotted land. *Id.*, 420 U.S. at 434, 95 S.Ct. at 1088. The agreement departed from the strict provisions of the Dawes Act because it gave the Indians a large number of allotments, each member of the Tribe receiving 160 acres regardless of age or sex, as requested by the Tribe. This approach provided the Sissetons with far more allotted land per capita than the Yanktons, for whom only heads of families received 160 acres pursuant to the Dawes Act. *Id.* 420 U.S. at 434 n. 16, 95 S.Ct. at 1088 n. 16.

The Sissetons declined to reserve other portions of the reservation for future allotments and tracts then occupied by the government for agency, school, and missionary purposes because they knew some of the principal and interest from the sale of surplus lands would be used for such purposes, and they did not think it would be proper for them to also reserve a large quantity of land for such purposes. *Id.* The Sissetons stated during negotiations that they did not

care to have an agency after the surplus lands were sold, and "[t]his little reservation is ours, and all we have left. There is nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell[.]" *Id.* Thus, the Sissetons expressed their understanding that they would not retain a reservation after the sale of the surplus lands.

The Sisseton and Yankton Agreements are dissimilar in significant ways. In the Sissetons' agreement, there were no counterparts to Articles V, VIII, XI, XVII, and XVIII found in the Yanktons' Agreement.

The legislative history of the Sissetons' agreement shows that Congress had a much different understanding about the future of the Lake Traverse Reservation upon ratification of that agreement than it had regarding the Yankton Sioux Reservation. The report of the Senate Committee on Indian Affairs recognized that each Sisseton would receive 160 acres, a departure from the allotment act, but nonetheless recommended ratification in light of the fact "that the additional allotments are *in lieu of any residue* which, under their title, these Indians could have reserved for the future benefit of their families, and the further fact that they are soon to assume the responsibilities of citizenship[.]" *Id.*, 420 U.S. at 438-39 n. 19, 95 S.Ct. at 1089-90 n. 19 (emphasis added). The report further explained that the reservation contained 918,780 acres, 127,887 of which had been allotted to the Indians under the Dawes Act. The

additional allotments allowed by Article 4 of the agreement required 112,113 more acres, for a total of 240,002 in allotments "which [left] a surplus, *including the lands occupied by the agency and missionary societies,* of 678, 778 acres, *the Indian title to which [was] extinguished by the terms of the agreement.*" *Id.* (emphasis added).

Such an explicit statement of congressional intent to extinguish Indian title to reservation lands cannot be found in the legislative history of the Yanktons' agreement. Moreover, the Sissetons relinquished far more acreage for settlement by non-Indians than they retained for themselves, as compared to the Yanktons who, overall, retained greater acreage for their allotments than they ceded for sale as surplus lands. Congress must have known, when it ratified the Sissetons' agreement in 1891, that the opened area would be settled by more non-Indians than Indians and that truly, the Indian character of the area would be forever changed. Three years later, when Congress ratified the Yanktons' Agreement reserving a larger portion of the reservation for the Indians' allotments, and reserving land for agency, school, and religious purposes, Congress must have known that the introduction of white settlers would change the Indian character of the Yankton Sioux Reservation to a degree, but not so dramatically as the Lake Traverse Reservation.

As the Eighth Circuit observed in its prior opinion, *DeCoteau* established that only 3,000 of 33,000 people, or nine percent, living within the original

exterior boundaries of the Lake Traverse Reservation at the time *DeCoteau* was decided were Indians, while using the lower of two conflicting population figures in this record, thirty-two percent of the population within the original exterior boundaries of the Yankton Sioux Reservation is Indian. *Yankton Sioux Tribe,* 99 F.3d at 1457 & n. 26. The recent evidence introduced into the record shows that the population of Indians living on and adjacent to the Yankton Sioux Reservation has increased during the 1990's. (Gov't. Exs. 5a-c.) Moreover, the Bureau of Indian Affairs Superintendent at the Yankton Agency, Timothy Lake, testified that, in addition to the Indian students who attend the Marty Indian School, 176 Indian students attend the Lake Andes public elementary school as compared with 72 white students, and 225 Indian students attend the Wagner public elementary school as compared to 227 white students.

In *DeCoteau,* the Supreme Court emphasized that the Sisseton-Wahpeton Sioux Tribe did not establish a tribal court or legal code to exercise the jurisdiction which the Tribe claimed in a 1966 tribal constitution to extend to lands lying within the original reservation boundaries. The evidence in this case shows a tribal court operated before and after the 1894 Act and that the Yankton Sioux Tribe has adopted a legal code to exercise the jurisdiction it claims to govern its own people within the original 1858 exterior boundaries.

Under the facts presented in *DeCoteau,* it is understandable that the Supreme Court held the

reservation was disestablished by the 1891 Act because that was the precise understanding held by the Sisseton-Wahpeton Tribe *itself*. In light of the far different facts presented by the Yankton Agreement, it is clear why the Supreme Court did not apply *DeCoteau* to hold the Yankton Sioux Reservation disestablished. In this opinion, this Court has exhaustively enumerated many reasons, based upon the strong textual and contemporaneous evidence, why the Yankton Sioux Reservation was not disestablished, and certainly, this Court will not apply the *DeCoteau* result to hold that the Yankton Sioux Reservation is disestablished.

V. Conclusion

The result of the Supreme Court's diminishment decision and this Court's determination in this opinion that the Yankton Sioux Reservation is not disestablished is a checkerboard pattern of jurisdiction on the reservation. The Court's decision, however, produces a stable, unchanging allocation of jurisdiction. *See Ute Indian Tribe*, 114 F.3d at 1530. The Yankton Sioux Tribe and the federal government exercise primary criminal and civil jurisdiction in "Indian Country," that is, the lands within the original exterior 1858 Treaty boundaries that are or were Indian allotments or lands reserved for agency purposes, even though some of those lands may now have passed into fee status. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, ___ 118 S.Ct. 948, 952 & n. 1, 140 L.Ed.2d 30 (1998); *DeCoteau*, 420 U.S.

at 427 n. 2, 95 S.Ct. at 1084 n. 2. "Indian Country" also includes rights-of-way running through the allotted and reserved areas which constitute the diminished reservation. 18 U.S.C. § 1151(a); *DeCoteau*, 420 U.S. at 427 n. 2, 95 S.Ct. at 1084 n. 2. Even in "Indian Country," the State may have jurisdiction over some persons or types of conduct, but such jurisdiction is quite limited. *See DeCoteau*, 420 U.S. at 427 n. 2, 95 S.Ct. at 1084 n. 2 (and cases cited therein). As stated in *Yankton Sioux Tribe*, 522 U.S. at ___, 118 S.Ct. at 797-98, state and local governments exercise primary criminal and civil jurisdiction over the ceded lands opened to settlement on the Yankton Sioux Reservation as a result of the 1894 Act of Congress. Although some title searches may be necessary to determine conclusively which lands were ceded under the 1894 Act, once the status of the lands is determined, the allocation of jurisdiction can be determined and jurisdiction likely will not change in the future as lands are bought and sold. *See Ute Indian Tribe*, 114 F.3d at 1530. Lands purchased by the Tribe and taken into trust by the federal government pursuant to 25 U.S.C. § 465, however, even if such lands lie within the ceded areas of the reservation, are subject to tribal and federal jurisdiction. *See Cass County*, 524 U.S. at ___, 118 S.Ct. at 1910, 141 L.Ed.2d 90.

With the interests of all parties carefully in mind, the Court reaches the decision warranted by law. It is incumbent upon the Yankton Sioux Tribe, the United States, the State of South Dakota, Charles Mix

County, and the affected municipalities, as well as each individual who resides within the affected area, to foster a spirit of communication, cooperation, and compromise in order to accommodate, as far as possible, each of the legitimate governmental, economic, social, political, and legal interests that are at stake. For all of the reasons stated,

IT IS ORDERED:

(1) that, in *Yankton Sioux Tribe v. Gaffey*, CIV 98-4042, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and its individual members and in favor of the plaintiff-intervenor United States of America and against the defendants Matt Gaffey, Herman Peters, Bruce Bakken, Jack Soulek, William Janklow, and Mark Barnett holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(2) that, in *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, CIV 94-4217, the Court enters a declaratory judgment in favor of the plaintiffs Yankton Sioux Tribe and Darrell Drapeau individually, and against the third-party defendant, State of South Dakota, holding that the 53rd Congress did not disestablish the Yankton Sioux Reservation in 1894 when it ratified the 1892 Agreement with the Yankton Sioux Tribe for the sale of surplus lands.

(3) that, in *Yankton Sioux Tribe v. Gaffey*, the Court dismisses with prejudice the counterclaims of the state defendants, William Janklow and Mark Barnett, and the county defendants, Matt Gaffey, Herman Peters, Bruce Bakken, and Jack Soulek against the plaintiffs Yankton Sioux Tribe and its individual members and the plaintiff-intervenor United States.

(4) that the Yankton Sioux Reservation, diminished by the 1894 Act only to the extent of the ceded lands, includes all of the lands within the original exterior reservation boundaries established by the 1858 Treaty with the Yankton Sioux Tribe that were later allotted to the Yanktons, as well as the lands reserved from sale for agency, school, and other tribal purposes in the 1892 Agreement.

(5) that the Yankton Sioux Reservation, as described in the preceding paragraph, is "Indian Country" within the meaning of 18 U.S.C. § 1151(a).

(6) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining William Janklow and Mark Barnett, in their official capacities as Governor and Attorney General of the State of South Dakota, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the

Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(7) that the Court enters a permanent injunction in favor of the Yankton Sioux Tribe, its individual members, and the United States enjoining Matt Gaffey, States Attorney of Charles Mix County, and Herman Peters, Bruce Bakken, and Jack Soulek, members of the Charles Mix County Commission, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, from exercising criminal law enforcement jurisdiction over members of the Yankton Sioux Tribe who are alleged to have committed crimes on allotted or reserved lands, notwithstanding any patent, and including rights-of-way running through the Yankton Sioux Reservation as described in paragraph 4.

(8) that all parties will bear their own attorney's fees and costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-1441

Yankton Sioux Tribe, and its individual members and United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe

Appellees

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.

Appellants

- - - - - - - - - - - - - - - - - - - -

Bennett County, South Dakota

Amicus on Behalf of Appellant

Rosebud Sioux Tribe

Amicus on Behalf of Appellee

Charles Mix Electric Association, Inc., et al.

Amici on behalf of Appellant

No: 08-1488

Yankton Sioux Tribe, and its individual members

Appellant

United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe

Appellee

v.

Scott J. Podhradsky, State's Attorney of Charles Mix County, et al.

Appellees

- - - - - - - - - - - - - - - - - - - -

Bennett County, South Dakota, et al.

Amici on Behalf of Appellee

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:98-cv-04042-LLP)
(4:98-cv-04042-LLP)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Judge Wollman did not participate in the consideration or decision of this matter.

September 20, 2010

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

[SEAL] SUPREME COURT
OF THE UNITED STATES

No. 10A592
Title: M. Michael Rounds, Governor of South Dakota, et al., Applicants
v.
Yankton Sioux Tribe, et al.
Docketed:
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (08-1441, 08-1488)

~~Date~~~	~~~~Proceedings and Orders~~~~~~~~~~
Dec 3 2010	Application (10A592) to extend the time to file a petition for a writ of certiorari from December 19, 2010 to February 17, 2011, submitted to Justice Alito
Dec 14 2010	Application (10A592) granted by Justice Alito extending the time to file until January 18, 2011.

~~Name~~~~	~~~~Address~~~~~~	~~Phone~~~~
Attorneys for Petitioners:		
John P. Guhin	Assistant Attorney General 1302 East Highway 14 Suite 1 Pierre, SD 57501-5070	(605) 773-3215

Party name: M. Michael Rounds, Governor of South Dakota, et al.

TREATY WITH THE YANKTON SIOUX, 1858

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A.D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

ARTICLE 1.

The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit – Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A.D. 1851.

ARTICLE 2.

The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit –

"Beginning at the mouth of the Tchan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san

or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Missouri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

ARTICLE 3.

The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to remove and settle and reside on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them

in the quiet and undisturbed possession of their present settlements.

ARTICLE 4.

In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2d. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years, commencing with the year in which they shall remove to, and settle and reside upon, their said reservation – forty thousand dollars per annum for and during ten years thereafter – twenty-five thousand dollars per annum for and during ten years thereafter – and fifteen thousand dollars per annum for and during twenty years thereafter; making one million and six hundred thousand dollars in annuities in the period of fifty years, of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise

exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the President of the United States, be diminished and reduced in proportion thereto – or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, store-houses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly thereat, during at least nine months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricultural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at

least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed are thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

ARTICLE 5.

Said Indians further stipulate and bind themselves to prevent any of the members of their tribe from destroying or injuring the said houses, shops,

mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians hae [sic] become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

ARTICLE 6.

It is hereby agreed and understood that the chiefs and headmen of said tribe may, at their discretion, in open council, authorize to be paid out of their said annuities such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: Provided, however, That their said determinations shall be approved by their agent for the time being, and the said payments authorized by

the Secretary of the Interior: Provided, also, That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

ARTICLE 7.

On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorian one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

ARTICLE 8.

The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone

for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

ARTICLE 9.

The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

ARTICLE 10.

No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and

divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

ARTICLE 11.

The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of

their reservation, whenever required to do so by such officer.

ARTICLE 12.

To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

ARTICLE 13.

No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

ARTICLE 14.

The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of

Laramie, and except, also such as are herein stipulated and provided for.

ARTICLE 15.

For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and occupation, at such a point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

ARTICLE 16.

All the expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

ARTICLE 17.

This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

Source: April 19, 1858, 11 Stat 743;
Ratified February 16, 1859;
Proclamation February 26, 1859.

AGREEMENT WITH THE YANKTON SIOUX OR DAKOTA INDIANS, IN SOUTH DAKOTA

Sec. 12. The following agreement, made by J.C. Adams and John J. Cole, commissioners on the part of the United States, with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dakota Indians upon the Yankton Reservation, in the State of South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, and now on file in the Department of the Interior, and signed by said commissioners on behalf of the United States, and by Charles Martin, Edgar Lee, Charles Jones, Isaac Hepikigan, Stephen Cloud Elk, Edward Yellow Bird, Iron Lingthing, Eli Brockway, Alex Brunot, Francis Willard, Louis Shunk, Joseph Caje, Albion Hitika, John Selwyn, Charles Ree, Joseph Cook, Brigham Young, William Highrock, Frank Felix, and Philip Ree, on behalf of the said Yankton tribe of Sioux Indians, is hereby accepted, ratified, and confirmed.

ARTICLES OF AGREEMENT

Whereas J.C. Adams and John J. Cole, duly appointed commissioners on the part of the United States, did, on the thirty-first day of December, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Yankton tribe of Sioux or Dacotah Indians upon the Yankton Reservation, in the State of South Dakota, which said agreement is as follows:

Whereas a clause in the act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth (30th), eighteen hundred and ninety-three (1893), and for other purposes, approved July 13th, 1892, authorizes the "Secretary of the Interior to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress;" and

Whereas the Yankton tribe of Dacotah – now spelled Dakota and so spelled in this agreement – or Sioux Indians is willing to dispose of a portion of the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858), between said tribe and the United States, and situated in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the act of Congress approved July thirteenth (13th), eighteen hundred and ninety-two (1892), at the Yankton Indian Agency, South Dakota, by J.C. Adams of Webster, S.D., John J. Cole of St. Louis, Mo., and I.W. French of the State of Neb., on the part of the United States, duly authorized and empowered thereto, and the chiefs, headmen, and other male adult members of said Yankton tribe of Indians, witnesseth:

ARTICLE I.

The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

ARTICLE III.

Section 1. Sixty days after the ratification of this agreement by Congress, or at the time of the first interest payment, the United States shall pay to the said Yankton tribe of Sioux Indians, in lawful money of the United States, out of the principal sum stipulated in Article II, the sum of one hundred thousand dollars ($100,000), to be divided among the members of the tribe per capita. No interest shall be paid by the United States on this one hundred thousand dollars ($100,000).

Section 2. The remainder of the purchase money or principal sum stipulated in Article II,

amounting to five hundred thousand dollars ($500,000), shall constitute a fund for the benefit of the said tribe, which shall be placed in the Treasury of the United States to the credit of the said Yankton tribe of Sioux Indians, upon which the United States shall pay interest at the rate of five per centum (5) per annum from January first, eighteen hundred and ninety-three (January 1st, 1893), the interest to be paid and used as hereinafter provided for.

ARTICLE IV.

The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

Section 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use

for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any money not belonging to the Yankton Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.

Section 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.

ARTICLE VI.

After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase

money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified.

ARTICLE VII.

In addition to the stipulations in the preceding articles, upon the ratification of this agreement by Congress, the United States shall pay to the Yankton tribe of Sioux Indians as follows: To each person whose name is signed to this agreement and to each other male member of the tribe who is eighteen years old or older at the date of this agreement, twenty dollars ($20) in one double eagle, struck in the year 1892 as a memorial of this agreement. If coins of the date named are not in the Treasury coins of another date may be substituted therefor. The payment provided for in this article shall not apply upon the principle [sic] sum stipulated in Article II, nor upon the interest thereon stipulated in Article III, but shall be in addition thereto.

ARTICLE VIII.

Such part of the surplus lands hereby ceded and sold to the United States as may now be occupied by the United States for agency, schools, and other

purposes, shall be reserved from sale to settlers until they are no longer required for such purposes. But all other lands included in this sale shall, immediately after the ratification of this agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only.

ARTICLE IX.

During the trust period of twenty-five years, such part of the lands which have been allotted to members of the Yankton tribe of Indians in severalty, as the owner thereof can not cultivate or otherwise use advantageously, may be leased for one or more years at a time. But such leasing shall be subject to the approval of the Yankton Indian agent by and with the consent of the Commissioner of Indian Affairs; and provided that such leasing shall not in any case interfere with the cultivation of the allotted lands by the owner thereof to the full extent of the ability of such owner to improve and cultivate his holdings. The intent of this provision is to compel every owner of allotted lands to cultivate the same to the full extent of his ability to do so, before he shall have the privilege of leasing any part thereof, and then he shall have the right to lease only such surplus of his holdings as he is wholly unable to cultivate or use advantageously. This provision shall apply alike to both sexes, and to all ages, parents acting for their children who are under their control, and the Yankton

Indian agent acting for minor orphans who have no guardians.

ARTICLE X.

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

ARTICLE XI.

If any member of the Yankton tribe of Sioux Indians shall within twenty-five years die without heirs, his or her property, real and personal, including allotted lands, shall be sold under the direction of the Secretary of the Interior, and the proceeds thereof shall be added to the fund provided for in Article V for schools and other purposes.

ARTICLE XII.

No part of the principal or interest stipulated to be paid to the Yankton tribe of Sioux Indians, under the provisions of this agreement, shall be subject to the payment of debts, claims, judgments, or demands

against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE XIII.

All persons who have been allotted lands on the reservation described in this agreement and who are now recognized as members of the Yankton tribe of Sioux Indians, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians.

ARTICLE XIV.

All allotments of lands in severalty to members of the Yankton tribe of Sioux Indians, not yet confirmed by the Government, shall be confirmed as speedily as possible, correcting any errors in same, and Congress shall never pass any act alienating any part of these allotted lands from the Indians.

ARTICLE XV.

The claim of fifty-one Yankton Sioux Indians, who were employed as scouts by General Alf. Sully in 1864, for additional compensation at the rate of two hundred and twenty-five dollars ($225) each, aggregating the sum of eleven thousand four hundred and

seventy-five dollars ($11,475) is hereby recognized as just, and within ninety days (90) after the ratification of this agreement by Congress the same shall be paid in lawful money of the United States to the said scouts or to their heirs.

ARTICLE XVI.

If the Government of the United States questions the ownership of the Pipestone Reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19th, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. And the United States shall furnish, without cost to the Yankton Indians, at least one competent attorney to represent the interests of the tribe before the court.

If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of the said Pipestone Reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone Reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.

ARTICLE XVII.

No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

ARTICLE XVIII.

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

ARTICLE XIX.

When this agreement shall have been ratified by Congress, an official copy of the act of ratification shall be engrossed, in copying ink, on paper of the size this agreement is written upon, and sent to the

Yankton Indian agent to be copied by letter press in the "Agreement Book" of the Yankton Indians.

ARTICLE XX.

For the purpose of this agreement, all young men of the Yankton tribe of Sioux Indians, eighteen years of age or older, shall be considered adults, and this agreement, when signed by a majority of the male adult members of the said tribe, shall be binding upon the Yankton tribe of Sioux Indians. It shall not, however, be binding upon the United States until ratified by the Congress of the United States, but shall as soon as so ratified become fully operative from its date. A refusal by Congress to ratify this agreement shall release the said Yankton Indians under it.

In witness whereof, the said J.C. Adams, John J. Cole, and J.W. French, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the said Yankton tribe of Sioux or Dakota – spelled also Dacotah – Indians, have hereunto set their hands and affixed their seals.

Done at the Yankton Indian agency, Greenwood, South Dakota, this thirty-first day of December, eighteen hundred and ninety-two (Dec. 31st, 1892).

JAMES C. ADAMS, [SEAL.]
JOHN J. COLE, [SEAL.]

The foregoing articles of agreement having been read in open council, and fully explained to us, we,

the undersigned, chiefs, headmen, and other adult male members of the Yankton tribe of Sioux Indians, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals of date as above.

Wicahaokdeun (William T. Selwyn), seal; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of six hundred thousand dollars, or so much thereof as may be necessary, of which amount the sum of five hundred thousand dollars shall be placed to the credit of said tribe in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum from the first day of January, eighteen hundred and ninety-three, said interest to be paid and distributed to said tribe as provided in articles five and six of said agreement. Of the amount herein appropriated one hundred thousand dollars shall be immediately available to be paid to said tribe, as provided in section one of article three of said agreement. There is also hereby appropriated the further sum of ten thousand dollars, or so

much thereof as may be necessary, which sum shall be immediately available, to be paid to the adult male members of said tribe, as provided in article seven of said agreement. There is also hereby appropriated the further sum of eleven thousand four hundred and seventy-five dollars, which sum shall be immediately available, to be paid as provided in article fifteen of said agreement: Provided, That none of the money to be paid to said Indians under the terms of said agreement, nor any of the interest thereon, shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of said agreement.

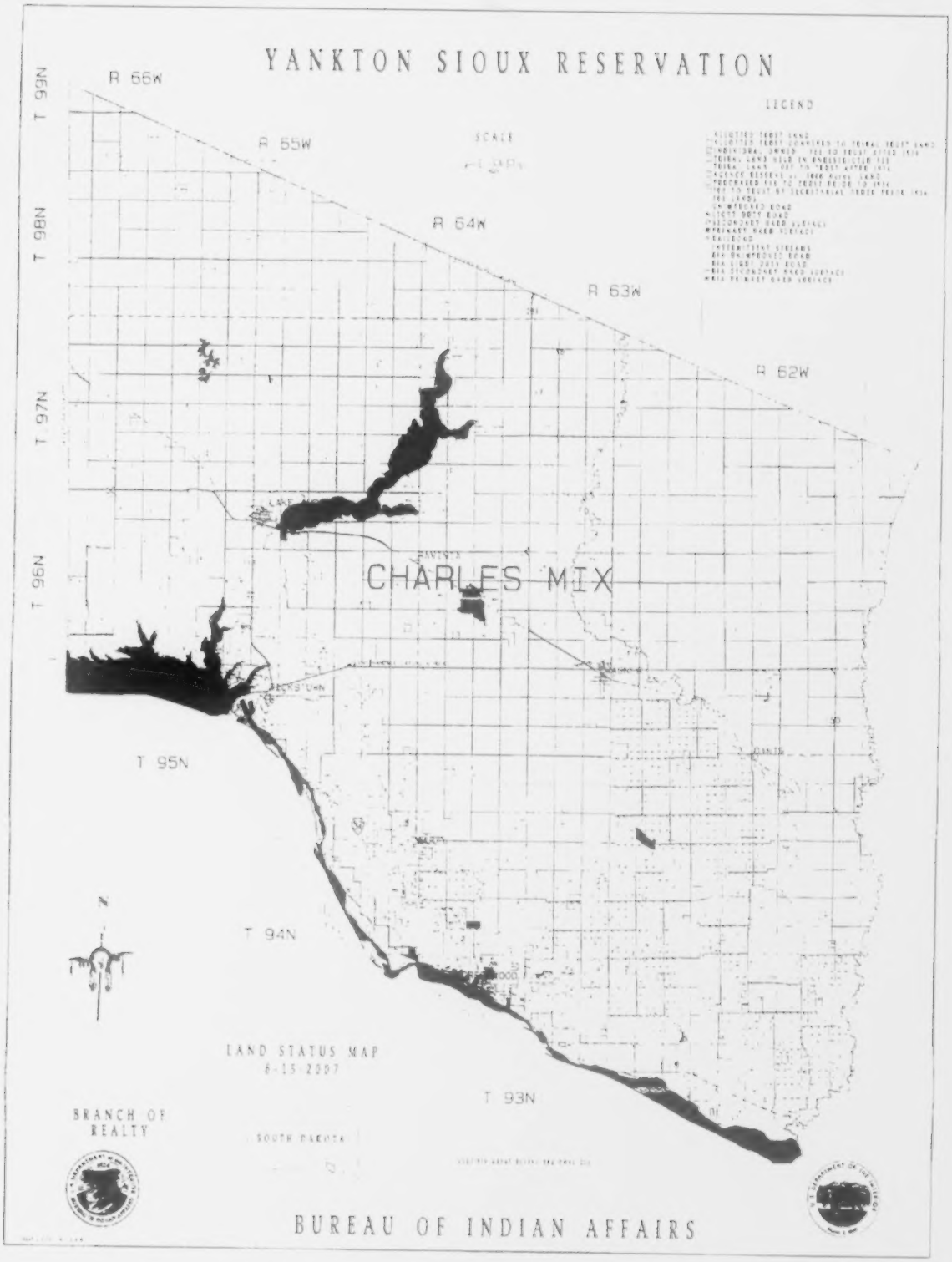
That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in

sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W.T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the Government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Source: 28 Stat 286.


YANKTON SIOUX RESERVATION
R 66W
R 65W
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R 63W
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T 99N
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T 95N
T 94N
T 93N
LEGEND
SCALE
CHARLES MIX
N
LAND STATUS MAP
8-13-2007
BRANCH OF
REALTY
SOUTH DAKOTA
BUREAU OF INDIAN AFFAIRS

App. 352

187 (7) (7) (8)
FILED
MAY 9 - 2011

NOS. 10-929, 10-931, AND 10-932

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,
Petitioners

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

PAM HEIN, CHARLES MIX COUNTY STATE'S ATTORNEY, ET AL.,
Petitioners

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

DARYL L. JOSEFFER
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel for Respondent Yankton Sioux Tribe

May 9, 2011 * additional counsel listed on inside cover

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW
Suite D
Washington, DC 20005
(202) 785-4166

CHARLES ABOUREZK
ABOUREZK & ZEPHIER, P.C.
P.O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

QUESTION PRESENTED

Whether Congress manifested a "clear and plain" intent to disestablish the Yankton Sioux Reservation completely in 1894.

PARTIES TO THE PROCEEDING

Petitioners are Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; Southern Missouri Recycling and Waste Management District; Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; and Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission.

Respondents are the Yankton Sioux Tribe and the United States of America.

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INTRODUCTION

Following a decade and a half of litigation, this case is now reduced to a fact-bound, splitless dispute that concerns only about 37,000 acres of the original Yankton Sioux Reservation and that has far less practical or legal significance than petitioners suggest. Thirteen years ago, this Court held that Congress "diminished" the Yankton Sioux Tribe's reservation in 1894 by removing 168,000 acres from the 430,405-acre reservation. The Court further emphasized that multiple provisions of the 1894 Act evidenced Congress's expectation that the Tribe would continue to have a diminished reservation.

On remand, petitioners nonetheless advanced the extreme position that the 1894 Congress intended to disestablish the reservation completely. After exhaustively reviewing the historical record, the district court and the Eighth Circuit both concluded that Congress intended no such thing, and this Court denied review of that fact-bound ruling of both lower courts in 2000. There is no reason for a different result now.

Only two things have changed since 2000. First, the scope of the parties' dispute has narrowed as the lower courts have considered the reservation status of various parcels of land, with the Eighth Circuit recognizing just 37,000 of the original 430,405 acres as reservation. Second, realities on the ground have adjusted to the existence of a limited reservation, with the Tribe and other governmental officials cooperating to handle criminal law enforcement and other matters. Thus, practical experience over the past decade has only confirmed that the fact-bound

question presented, which implicates no clear split in authority, is not so exceptionally important as to warrant this Court's review.

Indeed, all parties appear to agree that the approximately 37,000 acres now at issue are "Indian country" whether or not they are also reservation lands. Because jurisdiction generally turns on whether land is Indian country, not whether it is also reservation, the question presented has relatively few practical consequences. While the continued existence of a reservation of any size has profound cultural significance to the Yankton Sioux Tribe, whose sovereign existence has been under siege in the courts for over a decade, it lacks exceptional importance for those outside the Tribe.

In addition to failing to account for the Indian country status of the affected lands, petitioners' arguments ignore the strict limits this Court has imposed on Indian authority over non-Indians in Indian country of any kind. Petitioners and their *amici* also focus on lands the Eighth Circuit pointedly did *not* hold to be reservation or other Indian country. Those strained efforts only underscore that the fact-bound question presented lacks any actual exceptional importance. And this Court need not speculate on that point; the experience of the past decade provides the best guide. Revisiting the question now would only destabilize the practical accommodations reached over the last decade.

STATEMENT

A. Historical Background

1. In 1858, the Yankton Sioux Tribe and the United States entered into a treaty which established the original boundaries of the Yankton Sioux Reservation and set aside a homeland for the Tribe and its members. Pet. App. 324.[1] The Tribe ceded to the United States title to more than 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 325.

2. Three decades later, Congress enacted the General Allotment Act of 1887, also known as the Dawes Act, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). That Act adopted a federal policy of breaking up Indian reservations into smaller pieces, and eventually opening them up for settlement by non-Indians, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. 24 Stat. at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which

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[1] "Pet. App." refers to the appendix to the petition for certiorari in No. 10-929.

such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted.

In 1894, the United States reached an agreement with the Tribe, which Congress ratified in the Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 319, to purchase those unallotted acres for $600,000. *See* Pet. App. 337-351. A bare majority of the Tribe — 254 out of 458 signatories — ultimately consented to the sale, which whittled down the 430,405-acre reservation to approximately 262,300 acres of non-ceded, allotted lands.

The federal Commissioners who negotiated for the sale made clear that their specific objective was to arrange the purchase of the unallotted lands — and those alone. *Id.* at 232. They informed the Tribe that the government "'only wants you to sell your surplus lands for which you have no use.'" *Id.* at 222. The Commissioners then reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," because "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." *Id.* at 236. In negotiations with the Tribe, the Commissioners had also made numerous references to a "continuing tribal government." *Id.* at 233. The Commissioners further suggested that the Tribe

might "have this reservation organized as a separate county." *Id.*

The 1894 Act provided for the sale of the 168,000 acres of unallotted lands for payment of a sum certain. *Id.* at 229. Article XVIII declared that "[n]othing in this agreement shall be construed to abrogate" the 1858 Treaty establishing the Yankton Sioux Reservation. *Id.* at 347. Article XVII barred alcohol sales on "the lands ... ceded and sold to the United States" *and* "any other lands within or comprising the reservation of the Yankton Sioux." *Id.*

Other articles provided for ongoing tribal affairs on the reservation. Article V of the Act provided that certain funds be set aside for, *inter alia*, "schools and educational purposes," "courts of justice," and "other local institutions" of the Tribe. *Id.* at 341. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. *Id.* at 342-343.

3. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had expired, "left many Indians landless" and impoverished. *Id.* at 11. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "cultural resilience." *Id.* The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation that it had continuously held in trust. *See id.* at 10 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30,

1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than opening the 1,000 acres of reserved agency trust lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), put an end to further allotment and extended the trust periods for outstanding allotments indefinitely. The IRA also authorized the Secretary of the Interior to acquire additional lands in trust for Indians and Indian tribes. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. Pet. App. 12.

B. Procedural Background

1. This litigation began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the original 1858 boundaries of the reservation, sought to ensure that federal environmental regulations would apply to the site. What began as a modest effort by the Tribe to respond to an unlined landfill transmogrified into litigation posing an existential threat to the Yankton Sioux Reservation.

The dispute reached this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). This Court held that the Tribe's agreement to cede 168,000 acres of their unallotted lands to the United States in 1894 had "diminished" the original 1858 reservation. *See id.* at 345. The Court then concluded that, because the proposed waste site lay

on ceded unallotted land, it was not within the boundaries of the diminished reservation and therefore not subject to federal environmental regulation. *Id.* at 340, 358.

This Court expressly declined to reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court observed that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that the opened area would remain part of the reservation.'" *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII's prohibition against the sale of liquor on ceded lands and other lands within the reservation "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, and after the case was consolidated with another one concerning the reservation's boundaries, the district court conducted an evidentiary hearing. Based on the evidence, the district court concluded that the 1894 Act diminished the reservation only to the extent of the *unallotted* lands the Tribe had ceded to the United States in 1894. *See* Pet. App. 250-320. The court reasoned that nothing in the language of the agreement supported total disestablishment of the reservation, whereas several articles strongly indicated that a diminished reservation would persist. *See id.* at 287-304.

The district court also relied on the context of the Act. Reports of the government's negotiations with the Tribe, the court observed, "memorialized only the consent of the Tribe to sell the surplus [unallotted] lands"; they did not discuss total disestablishment or further diminishment beyond the unallotted lands. *Id.* at 276. Representations by the Commissioners who negotiated the agreement further suggested that the Tribe would retain independent powers of self-government over the lands it did not cede. *See id.* at 276-281. Based on that evidence, the court concluded that the Yankton Sioux Reservation consists, in diminished form, of all land "within the original exterior 1858 Treaty boundaries" that the Tribe did not cede to the United States in the 1894 Act, as well as the agency trust land that the Act specifically reserved from sale. *Id.* at 316.

3. The Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See id.* at 199-249. The court of appeals agreed that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 237-243. At a bare minimum, the Eighth Circuit noted, the agency trust lands, which this Court had specifically highlighted in *Yankton*, remain part of the reservation. *Id.* at 241. The court of appeals disagreed, however, with the Tribe's argument that the original reservation had been diminished only with respect to the ceded, unallotted lands. Rather, the court found the reservation further diminished by subsequent sales of allotted lands to non-Indians — lands that, according to the court, the 1894 Congress "foresaw

would pass into the hands of the white settlers and homesteaders." *Id.* at 243.

4. Both the State and the Tribe sought certiorari. The State maintained its total disestablishment position and the Tribe maintained the position on which it had prevailed in the district court — namely, that the reservation had not been further diminished by sales of allotted lands to non-Indians. The United States "agree[d] with the Tribe" that the reservation had not been further diminished. U.S. Br. in Opp. (Nos. 99-1490, 99-1683) at 21. The United States opposed certiorari, however, noting the absence of a clear split in authority and the interlocutory posture of the case. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

5. On remand, the district court determined that various parcels within the original 1858 boundaries maintained reservation status: (1) agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) lands allotted to individual Indians that remain in trust today; (3) lands additionally taken into trust under the 1934 IRA; and (4) lands allotted to individual Indians that are still owned in fee by Tribe members but not held in trust. *See* Pet. App. 122-163. The district court again rejected the defendants' claim that Congress had disestablished the Yankton Sioux Reservation in its entirety. *Id.* at 127-128.

6. The Eighth Circuit largely affirmed. *See id.* at 1-51. The court of appeals held that the diminished reservation included (1) agency trust

lands, (2) allotted lands that remain in trust, and (3) lands taken into trust under the 1934 IRA. *Id.* at 51. The court found further that nearly 175 acres of miscellaneous lands acquired in trust under authorities other than the IRA qualify as dependent Indian communities under the definition of "Indian country" in 18 U.S.C. § 1151(b). *Id.* at 42-43. But the court of appeals vacated the district court's holding that allotted fee lands continuously owned by Indians but not held in trust are also Indian country, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 46.

The court further acknowledged the defendants' renewed efforts to declare the Yankton Sioux Reservation disestablished, but noted that they had offered "no persuasive reasons to revisit" or deem "erroneous" the prior holding, which had been based on "an exhaustive analysis of ... historical materials." *Id.* at 21, 23; *see also id.* at 54.

The State and County defendants filed petitions for rehearing and rehearing en banc. Again, defendants renewed their total disestablishment claim — which, the Eighth Circuit noted, they had already "unsuccessfully pressed ... twice before the district court ... and twice before this court," and each time had been "squarely rejected after thorough study of the record and exhaustive consideration of the precedents." *Id.* at 54, 61.

Defendants also took issue with two sentences in a footnote of the court of appeals' opinion to the effect that former allotments within the original boundaries of the reservation that were patented in

fee after 1948 would have reservation status. The Eighth Circuit issued a revised opinion with an identical judgment that eliminated the footnote, and criticized defendants for objecting to dicta on "issues which the court did not decide and which are beyond the scope of this litigation." *Id.* at 56.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Applied Well-Established Legal Principles To The Facts Of This Case.

The Eighth Circuit's determination that Congress did not express a clear intent to disestablish the Yankton Sioux Reservation in 1894 reflects a fact-bound application of established legal standards to a detailed evidentiary record. That fact-intensive determination, reflecting the considered views of both lower courts, does not warrant this Court's review. *See* Sup. Ct. R. 10; *cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

The governing standards for disestablishment are well-settled. This Court has adopted "a fairly clean analytical structure" for analyzing disestablishment issues. *Solem*, 465 U.S. at 470. The "first and governing principle" is that "*only Congress* can divest a reservation of its land and diminish its boundaries." *Id.* (emphasis added). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots," that whole block retains the

status of reservation "*until Congress* explicitly indicates otherwise." *Id.* (emphasis added).

The Court, meanwhile, has emphasized time and again that Congress's intent to disestablish or even diminish a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738 (1986), and cannot "be lightly inferred." *Solem*, 465 U.S. at 470; *see also Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *United States v. Celestine*, 215 U.S. 278, 285 (1909). Congressional intent "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505; *see also id.* n.22 (giving examples of Congress's "clear language of express termination when that result is desired"). Absent such "substantial and compelling evidence," the "traditional solicitude for the Indian tribes" compels a conclusion that the reservation survives. *Solem*, 465 U.S. at 472.

That determination, moreover, is uniquely fact-bound. Each surplus land act that followed the General Allotment Act must be construed in light of "the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Thus, even when treaties with different tribes contain comparable language, "the historical record and ... context of the treaty negotiations" may compel different outcomes. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

The Eighth Circuit applied those "standard rules of interpretation" to the particular facts and circumstances surrounding the surplus land act at issue here. Pet. App. 228. To gauge Congress's

intent, the court correctly looked to the "most probative evidence" — the statutory language — as well as "legislative history" and "events surrounding the statute's passage." *Id.*; *see also id.* at 30-34, 221-222, 224-243. And based on the extensive record amassed by the parties, the Eighth Circuit, like the district court, reasonably concluded that "[n]either the text of the 1894 Act nor evidence of the parties' contemporaneous understandings *clearly establish* an intent to disestablish the Yankton Sioux Reservation." *Id.* at 241 (emphasis added); *see also id.* at 32-34.

The Eighth Circuit, like the district court before it, emphasized that the text of the 1894 Act "refer[red] explicitly *only* to the ceded lands," not to any change in the status of other lands. *Id.* at 229 (emphasis added). Article V, moreover, required that funds be set aside "[f]or the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe," "schools and educational purposes," "courts of justice," and "other local institutions," *id.* at 341 — suggesting "an intent to preserve tribal self-government." *Id.* at 292. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe — reflecting Congress's expectation that the federal government would continue to play a significant role in providing "for the welfare of the Tribe." *Id.* at 240, 342-343. And Article XVII, in barring alcohol sales, specifically distinguished between "lands ... ceded and sold to the United States" and "any other lands within or comprising the reservation[]." *Id.* at 347. That distinction

would be incoherent unless Congress anticipated that "lands ... comprising the reservation[]" would continue to exist. All those articles, the Eighth Circuit and district court concluded, establish Congress's intent to preserve the reservation status of at least some allotted lands.

Both the Eighth Circuit and the district court further observed that the federal Commissioners negotiating the agreement did not view their mission as encompassing disestablishment of the reservation. *See id.* at 232, 276. The Commissioners reported to Congress that the Yankton Sioux Indians "were not selling their whole reservation," as "more than three-fifths of it would remain in their possession." *Id.* at 236. At a meeting with the Tribe, Commissioner Cole declared that "the Great White Father ... does not want you to sell your homes that he has allotted to you. He wants you to keep your homes forever." *Id.* at 216. The Commissioners even suggested that the Tribe might have their "reservation organized as a separate county." *Id.* at 233. Accordingly, the Commissioners did not "mention any transfer of the Yanktons' tribal sovereignty," and instead made numerous references to a "continuing tribal government." *Id.* at 233, 236.

As explained in the Conditional Cross-Petition, the Tribe believes that the best reading of Congress's intent is that the reservation was diminished only to the extent of the ceded lands. *See* Conditional Cross-Petition of Yankton Sioux Tribe, No. 10-1058. But the evidence detailed above confirms that the one position that is not reasonable is the one advocated by petitioners — that Congress clearly intended to disestablish the entire reservation. And in any

event, petitioners' contrary arguments amount to no more than a request for fact-bound error correction.

II. There Is No Split In Authority Warranting This Court's Intervention.

The Eighth Circuit's inherently fact-specific assessment of this specific reservation implicates no clear conflict in authority.

A. There Is No Conflict With Supreme Court Precedent.

1. Petitioners strain to conjure a "conflict" with this Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). *See* State Pet. 23-26; County Pet. 24-27; District Pet. 13. County petitioners, for example, assert that this Court "held that the 1858 reservation boundaries were disestablished in their entirety." County Pet. 25. This Court, of course, held no such thing. The Court made crystal clear that it was not opining definitively on "whether Congress disestablished the reservation altogether." 522 U.S. at 358.

This Court's reasoning, however, strongly suggested that the reservation was *not* disestablished. The Court noted that certain provisions of the Act "contradict[]" and "counsel[] against finding the reservation terminated," including the provisions concerning agency lands and alcohol discussed above. *Id.* at 350. The Court concluded, for example, that it was "'difficult to imagine'" why Congress would have reserved agency trust lands for tribal use "'if it did not anticipate that

the opened area would remain part of the reservation.'" *Id.* (quoting *Solem*, 465 U.S. at 474).[2]

Indeed, the Court's reasoning in finding a diminishment depended in significant respects on there not being a total disestablishment. Provisions of the Act that referenced a continuing reservation could be reconciled with a diminishment finding only if a diminished reservation would continue to exist. In other words, certain provisions of the Act were distinguishable in *Yankton* on the ground that they applied to the portion of the reservation that Congress was not disestablishing in 1894; but they cannot be reconciled with petitioners' position that Congress was completely disestablishing the reservation.

Petitioners nonetheless accuse the Eighth Circuit of disregarding a supposed "presumption of diminishment/*disestablishment*." County Pet. 22 (emphasis added); *see also* State Pet. 24. But *Yankton* held only that the 1894 Act's cession of the unallotted acres for a sum certain led to a "presumption of *diminishment*" as to those unallotted acres, *not* that there was a further presumption of total disestablishment of all reservation lands. *See* 522 U.S. at 344 ("explicit

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[2] This Court certainly did not hold, as petitioners claim, that the agency trust lands are not reservation lands. Petitioners are correct that this Court held generally that the unallotted lands are not reservation, but it recognized that the agency trust lands (which had been unallotted) are different by emphasizing that Congress must have intended that they "'would remain part of the reservation.'" *Yankton*, 522 U.S. at 350.

language of cession" and "fixed-sum payment" create "'presumption of diminishment'"); *see also Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("statutory expression of congressional intent to diminish" and "sum certain payment" create "presumption that the reservation had been diminished").

Nor would a broader presumption make sense in this case, where the Tribe ceded only 40% of its reservation to the United States. The 1894 agreement to sell those unallotted lands for a sum certain manifested an intent to divest *those* lands from Indian sovereignty, and thus diminish the reservation to that extent. But there is no basis for presuming that Congress intended to further diminish or totally disestablish the reservation with respect to all of the other lands — allotted lands comprising a majority of the original reservation — that the Tribe did *not* cede and for which it did *not* receive a sum certain as payment. *Cf.* Pet. App. 213 (terms "diminishment" and "disestablishment" not "interchangeabl[e]"; "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size").

2. Petitioners also assert a conflict with *DeCoteau v. District County Court*, 420 U.S. 425 (1975), where the Court found the Lake Traverse Indian Reservation disestablished. *See* State Pet. 20-24; County Pet. 33-35; District Pet. 10. But their claim that *DeCoteau* controls "[a]s night follows day," State Pet. 20, is telling. That premise "that similar language in two Treaties involving different parties has precisely the same meaning" is the very assumption that this Court has dismissed as "a

fundamental misunderstanding of basic principles of treaty construction." *Mille Lacs*, 526 U.S. at 202. As the Court has consistently warned, analysis of surplus land acts must be individualized based "on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469.

This is a case in point. Any parallels between the Yankton and Lake Traverse agreements do not nullify the stark differences. In *DeCoteau*, "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' *all point[ed] unmistakably*" to disestablishment. 420 U.S. at 444-45 (emphasis added). The tribe indicated with marked clarity that the reservation would be terminated. *See id.* at 433-34 ("'We never thought to keep this reservation for our lifetime.... We don't expect to keep reservation.'"); *id.* at 435-436 n.16 ("'This little reservation ... was given us as a permanent home, but now we have decided to sell'").

Here, by contrast, the courts' "exhaustive analysis" of the Yankton Sioux Tribe's agreement and the historical evidence uncovered no such unmistakable signs. Pet. App. 23. The negotiating Commissioners never "describe[d] any reservation boundaries or mention[ed] any transfer of the Yanktons' tribal sovereignty." *Id.* at 236. Rather, the Commissioners assured the Tribe that the government "only wants you to sell your surplus lands for which you have no use," *id.* at 222, and "wants you to keep your homes forever." *Id.* at 216. They further suggested that the Tribe's leaders would "retain some governing powers" and might "'have this reservation organized as a separate county.'" *Id.* at 233. Because the context, "content

and wording of the agreements are very different," *id.* at 221, the Eighth Circuit correctly distinguished *DeCoteau*.

3. Finally, petitioners also suggest that the Eighth Circuit's analysis conflicts with this Court's decisions by not giving adequate consideration to post-enactment history and tribal "land in common" in assessing reservation status. *See* State Pet. 22, 24-25, 29-30. As this Court explained in *Solem*, however, when post-enactment treatment is "rife with contradictions and inconsistencies," it is "of no help to either side." 465 U.S. at 478. And this Court already determined that post-1894 understandings of the Yankton Sioux Reservation have been "conflicting," "mixed," and "inconsistent" at best. *Yankton*, 522 U.S. at 354, 356, 358; *see also id.* at 354 & n.5 (noting that Congress in 1896 and even the 1980s and 1990s still referred to the "Yankton Indian Reservation"). Petitioners' one-sided portrayal of the post-enactment history is misleading, and only underscores the fact-bound nature of the question presented. *See infra* p.11-15.

Nor is the apparent lack of tribal ownership of land immediately following the 1894 Act dispositive. This Court stated in *Solem* that reservation status was generally "coextensive with tribal ownership" at the turn of the century. 465 U.S. at 468. But that reference to "tribal ownership" is not limited to land owned by a tribe qua tribe; instead, it reasonably encompasses ownership of allotted parcels by individual tribal members and tribal rights to use and occupancy of agency trust lands, both of which have always been present here. *See* Pet. App. 230. And in any event, tribal retention of land in common

is at most one factor in the broader analysis of congressional intent. *See Yankton*, 522 U.S. at 358 ("The conflicting understandings about the status of the reservation, *together with* the fact that the Tribe continues to own land in common, caution us ... to limit our holding") (emphasis added).

B. There Is No Conflict Within The Eighth Circuit.

Petitioners next assert that the Eighth Circuit's decisions are "internally contradictory." State Pet. 31. Even if that were true, which it is not, certiorari would not be warranted because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). In any event, there are no "internal difficulties" because the Eighth Circuit's decisions are fully consistent.

In *Gaffey*, the Eighth Circuit held that "lands originally allotted to tribal members which have passed out of Indian hands ... are not part of the Yankton Sioux Reservation." Pet. App. 247. The court then held that other lands *did* remain part of the reservation, though the court was not prepared to "define the[ir] precise limits" on the scant record at that time. *Id.* at 248-249. It therefore "remand[ed] to the district court with instructions to develop the record ... relevant to the status of the remaining categories of land." *Id.* at 17. The Eighth Circuit's subsequent decisions in this case and the companion *Army Corps* case are fully consistent with *Gaffey* for the simple reason that they address issues that *Gaffey* left open for remand.

Petitioners appear to assume that, because private land sales cannot by themselves diminish a reservation, total disestablishment is the only possible explanation for *Gaffey*'s holding that lands sold to non-Indians are no longer reservation. That is clearly wrong because *Gaffey* expressly rejected disestablishment before holding, in the same opinion, that allotted lands sold to non-Indians are no longer reservation. *Id.* at 247.

The Tribe, to be sure, disagrees with the Eighth Circuit's holding to that extent and believes that Congress did not intend any further diminishment. But that context-specific, fact-bound dispute does not warrant further review. It certainly does not warrant further review of petitioners' extreme total disestablishment position.

C. There Is No Clear Conflict With The South Dakota Supreme Court.

Finally, the Eighth Circuit's fact-intensive decisions present no clear and intractable split with decisions of the South Dakota Supreme Court, as the Eighth Circuit itself concluded. *Id.* at 23 n.7.

In *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), a tribal member defendant convicted on a state burglary charge argued on habeas that the state lacked jurisdiction because the offense took place in "Indian country." *Id.* at 365. The South Dakota Supreme Court held that the relevant parcel was not "Indian country" and denied relief. *Id.* at 378. The parties had stipulated that the offense took place on allotted lands which had passed into non-Indian ownership, and the court reasoned that such lands do not have reservation status. *See id.* at 365

("Here we must decide the status of allotted lands which have passed into non-Indian ownership.").

The Eighth Circuit has fully agreed with the South Dakota Supreme Court on that point: "lands originally allotted to tribal members which have passed out of Indian hands ... are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247. Although the South Dakota Supreme Court's opinion reached out to include the broader rationale that the 1894 Act disestablished the Yankton Sioux Reservation in its entirety, that rationale was unnecessary to the decision of the case, and thus, as the Eighth Circuit observed, it does not present a square conflict. *Id.* at 23 n.7. This Court reviews conflicts in holdings, not in unnecessary reasoning.

Moreover, the Eighth Circuit and the South Dakota Supreme Court apparently agree that the lands at issue in this case — various lands held in trust for the tribal members — are "Indian country." *Bruguier* repeatedly noted, in reasoning that the parcel at issue in that case was not "Indian country," that it was not "trust land." 599 N.W. at 378; *see also id.* at 367 ("none of [Pickstown] is now held ... in trust"); *id.* at 369 ("Congress must not have considered Pickstown Indian country taken in trust for the Yankton Tribe or its members"). Accordingly, that court appeared to recognize that trust lands are Indian country. And as explained below, jurisdictional status generally turns on that classification, not on whether land is also within a reservation.

In this and every other reported case, therefore, any difference in reasoning between the two courts has no practical effect. Petitioners' inability to cite any state or federal case over the past decade that was affected by the supposed conflict confirms that there is no meaningful, square conflict. And, in all events, there is no more reason to review this issue now than when this Court last denied certiorari. The split has not deepened and this case remains interlocutory even at this stage. *See* Pet. App. 45 (deeming status of former allotments continuously held in fee by Indians to be not yet "ripe for resolution").

III. The Decision Below Lacks Exceptional Importance.

While the Eighth Circuit's decision has profound cultural significance to the Yankton Sioux Tribe, it is not exceptionally important from a practical or legal standpoint.

1. At the outset, the territorial scope of the parties' dispute has narrowed dramatically over the course of this litigation, including in the 11 years since this Court denied review of the question presented. In the decision below, the Eighth Circuit upheld the reservation status of a mere 37,000 acres — approximately 8.5% of what was once a 430,405-acre reservation set aside as a homeland for the Tribe under the 1858 Treaty. The diminished reservation is located entirely within Charles Mix County, whose population today totals approximately 9,000 — over 30% (2,900) of which are Indian. *See* 2010 Census Data, www.census.gov. Thus, from historical, territorial, and demographic

perspectives, the Eighth Circuit's holding that this 37,000-acre fraction remains part of the Yankton Sioux Reservation raises issues of only limited importance.

2. More importantly, even within those acres, the nature of the jurisdictional dispute between petitioners and the Tribe is narrow. As noted above, the Eighth Circuit, the Supreme Court of South Dakota, and the parties all agree that the allotted lands continuously held in trust for the Tribe and its members are "Indian country" under 18 U.S.C. § 1151. *E.g.*, Pet. App. 226. Petitioners view the lands as being Indian country within the meaning of § 1151(c), which covers "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The Tribe views the lands as being Indian country under both § 1151(c) and § 1151(a), which covers "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[3]

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[3] The court of appeals separately addressed the status of different categories of lands and in some instances gave additional, contextual reasons for holding each to be Indian country. For example, the court of appeals concluded that lands taken into trust under the IRA are Indian country whether or not they are also reservation, *see* Pet. App. 37, and that certain other lands are "dependent Indian communities" comprising Indian country under 18 U.S.C. § 1151(b). Pet. App. 159-60. The court thereby made clear that all of these lands are Indian country whether or not they are reservation.

For the Tribe, the distinction between "reservation" land and land that is "Indian country" but not "reservation" land is vital to preserving the Tribe's cultural heritage. As the Eighth Circuit recognized, "[w]hatever the size of the remaining reservation lands," the record reflects that those lands hold "continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage." Pet. App. 14. The Indian character of these lands has persisted since 1894, and the "population of Indians living on and adjacent to the Yankton Sioux Reservation" has actually "increased during the 1990's," continuing to rise today. *Id.* at 315.

The Indian population has fueled demands for housing, elementary school education, and other services. *See* U.S. Br., *Gaffey*, at 41 (quoting Tr. of May 20, 1998 Evidentiary Hearing at 22, 72, 73, 76). Further, the Tribe is the largest employer in the county, assembling a workforce that is 75% Indian. *Id.* at 42 (quoting Tr. 69). Thus, the successful efforts of the Tribe to maintain a homeland for its

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Those holdings are not within the scope of the question presented, which asks only whether Congress completely disestablished the reservation in 1894. *See, e.g.*, State Pet. i. Petitioners had good reason not to include those rulings concerning specific categories of lands in the question presented, because they are even less important and less deserving of this Court's review than petitioners' total disestablishment position. Thus, the practical importance of the question presented is limited to the difference between reservation and other types of Indian country — a distinction that, as explained in the text, lacks exceptional importance.

members, to preserve its cultural heritage, and to protect its integrity and self-determination would be thoroughly undermined by a finding that the Yankton Sioux Reservation ceased to exist in 1894.

Apart from the cultural significance to the Tribe of having a reservation, however, the distinction between sub-provisions of Section 1151 lacks practical significance in this case. Petitioners fail to articulate any significant jurisdictional distinction between lands within an Indian reservation and other Indian country. Jurisdictional consequences generally flow from whether land is "Indian country," not from whether it is "reservation" or is Indian country for some other reason. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 528-30 (1998).

The practical difference between Indian country under § 1151(a) and § 1151(c) is that Indian country under the former remains part of the reservation even when sold to non-Indians, whereas Indian country under the latter loses its Indian country status upon any sale to a non-Indian going forward. At this point in time, however, it is nearly inconceivable that the Tribe would sell the remaining acres at issue to non-Indians, especially considering that the government holds them in trust for the benefit of the Indians.

Thus, there is no real consequence to whether the lands are Indian country for the one reason as

opposed to another. So long as the trust lands are classified as Indian country for any reason, the Tribe and the federal government have primary jurisdiction. *See Citizen Band*, 498 U.S. at 511; *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914). But under any classification, an Indian tribe's authority over non-Indians is sharply limited under this Court's precedents.

A tribe's inherent sovereign powers "do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981); *see also id.* at 564 ("exercise of tribal power [does not go] beyond what is necessary to protect tribal self-government or to control internal relations"). The "general rule" is that "Indian tribes lack civil authority over the conduct of nonmembers," even on "non-Indian land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *see also Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001) ("Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.").

The *only* civil authority tribes may exercise over non-members on non-Indian fee lands within a reservation is limited to two narrow exceptions: (1) activities of non-members who enter consensual commercial dealing, contract, or lease relationships with the tribe or its members, and (2) conduct of non-members that menaces the tribe's "political integrity," "economic security," or "health or welfare." *Montana*, 450 U.S. at 565-66; *see also* Cohen's Handbook of Federal Indian Law § 4.02[3][c], at 233 (2005 ed.) (noting "elevated threshold for satisfying the two *Montana*

exceptions"). And this Court has construed those exceptions narrowly. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008); *Atkinson*, 532 U.S. at 656.

Amici's claim that the Eighth Circuit has given the Tribe "criminal jurisdiction over the affected lands — period" is similarly foreclosed by settled law. *Amicus* Br. for Colin Soukup et al., at 17. This Court long ago established, in a case involving non-Indian residents *on a reservation*, that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), *superseded in part by statute on other grounds as stated in United States v. Lara*, 541 U.S. 193, 205-07 (2004); Cohen's Handbook § 4.02[3][b], at 226.

3. The lack of exceptional practical importance is confirmed by the strained efforts of petitioners and *amici* to pose academic questions that are not actually presented by the decision below. They attack a statement in a footnote in the court of appeals' original opinion stating that allotted lands that were first transferred to non-Indians after 1948 remain reservation lands. County Pet. 19-20 & n.4; *see also* State Pet. 34-35, 37; Dist. Pet. 6-9; *Amicus* Br. for Colin Soukup et al., at 9-25; *Amicus* Br. for Wagner Cmty. Sch. Dist., at 4-5. Indeed, many of the briefs, including the District's petition and most of the *amici* briefs, appear to rely entirely on such allotted lands for their assertions of harm. But as petitioners begrudgingly acknowledge, the Eighth Circuit removed that footnote from its final amended opinion.

In deleting the footnote, the Eighth Circuit criticized petitioners for spinning out "possible consequences of a decision which the court has not reached" and raising a "virtual smokescreen" and "straw man to attack." Pet. App. 54, 56, 59-60. The two sentences were mere "dicta" that "did not speak to any matter actually litigated or decided." *Id.* at 54-55.

Petitioners and *amici* now attack the same straw man even though the straw man is now a phantom lacking even the weight of straw in light of the Eighth Circuit's deletion of the footnote. Notwithstanding vague allusions to a residual "rationale" in the amended opinion, *see* County Pet. 20 n.4, District Pet. 9, petitioners have not identified any holding about the lands in question that this Court could review, because there is none. Indeed, the very multitude of estimated acreages of post-1948 lands bandied about — "5,900" (State Pet. 35), "6,000" (County Pet. 19), "7,000" (District Pet. 6), and "8,000" (*Amicus* Br. of Wagner Cmty. Sch. Dist., at 4) — confirms that no court has yet to consider the post-1948 fee lands. As the court determined, the "record remains inadequate to decide the status of such lands." Pet. App. 60.

Accordingly, that issue is not ripe for this Court's review. *Cf., e.g., Amicus* Br. of Wagner Cmty. Sch. Dist., at 5 (language "will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 U.S.C. § 1151(a) reservation"). If and when the issue is litigated, a court delivers a binding judgment, and actual consequences materialize, the issue will be ripe for this Court to decide whether to review it. In the

interim, petitioners' focus on this phantom only underscores that the actual decision below has insufficient importance to warrant review. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). *A fortiori*, it does not review statements that have been deleted from opinions.

4. The Eighth Circuit's decisions below also have little impact on other Indian reservations nationwide. Petitioners claim that the decision creates "the prospect of thousands or perhaps tens of thousands of such permanent 'mini-reservations' nationally" because many "terminated areas of reservations contain allotted land." State Pet. 36. But such assertions not only adopt the fallacy that all surplus land acts are the same, they also forget that the Eighth Circuit engaged in a careful, category-by-category analysis of the reservation status of each type of trust lands precisely to avoid a broad-brush rationale that would extend beyond this particular reservation. *See* Pet. App. 34-44.

And the "checkerboard" shape of the Yankton Sioux Reservation is by no means unprecedented. From the Red Lake Indian Reservation and Bois Forte Indian Reservation in Minnesota, to the Païute Indian Reservation in Utah, to the Laguna Pueblo, Zia Pueblo, and Jemez Pueblo Reservations in New Mexico, numerous Indian reservations across the United States have long consisted of scattered, non-contiguous parcels. *See, e.g.*, *Montana*, 450 U.S. at 559 (plurality opinion); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 421 (1989); *Ute Indian Tribe of Uintah & Ouray*

Reservation v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997).

That should come as no surprise, because the allotment policy had the inevitable effect of producing non-contiguous reservations, as non-Indians purchased some parcels while Indians retained others. Thus, this Court has rejected the contention that "it is not to be supposed that Congress has intended to maintain the Federal jurisdiction over hundreds of allotments scattered through territory other portions of which were open to white settlement." *Pelican*, 232 U.S. at 449-50. "Nor does the territorial jurisdiction of the United States depend upon the size of the particular areas which are held for Federal purposes." *Id.* at 450.

Jurisdiction in the Yankton Sioux Reservation, as in other non-contiguous reservations, has proven workable. In the 12 years since *Gaffey*, federal, state, and tribal authorities have all cooperated effectively and harmoniously. For many years, the Yankton Sioux Tribe has entered cooperative agreements with the County and State on public matters ranging from road maintenance and fire protection, to use of the same jail, to emergency dispatch services — agreements that, by their terms, expressly set aside jurisdictional disagreements for the safety and benefit of residents. Tribal and federal law enforcement officials, meanwhile, have been exercising jurisdiction over crimes committed on tribal trust lands and individual trust properties without incident — as confirmed by the absence of an actual conflict in authority between the federal and state courts.

Over a decade ago, when *Gaffey* was newly decided, the Tribe sought certiorari because it appeared that the Eighth Circuit's decision would have exceptionally important practical consequences. The past decade of on-the-ground experience has shown those concerns to be misplaced. And now that tribal, federal, and local authorities have adapted to this regime, changing it would be among the most destabilizing options of all.

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

Paul D. Clement
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Daryl L. Joseffer
Candice Chiu
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 737-0500

Richard A. Guest
NATIVE AMERICAN
RIGHTS FUND
1514 P Street NW,
Suite D
Washington, DC 20005
(202) 785-4166

Charles Abourezk
ABOUREZK &
ZEPHIER, P.C.
P.O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

Counsel for Respondent
Yankton Sioux Tribe

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Nos. 10-929, 10-931, 10-932 and 10-1058

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PETITIONER

v.

YANKTON SIOUX TRIBE ET AL.

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE ET AL.

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v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL.

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

(Additional Counsel Listed on Inside Cover)

IGNACIA S. MORENO
Assistant Attorney General
KATHRYN E. KOVACS
KATHERINE W. HAZARD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, did not wholly disestablish the Yankton Sioux Reservation.

2. Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the 1894 Act.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-51a)[1] is reported at 606 F.3d 994. The memorandum opinion and order of the district court (Pet. App. 122-163) is reported at 529 F. Supp. 2d 1040. A prior opinion of the court of appeals (Pet. App. 199-249) is reported at 188 F.3d 1010. A prior memorandum opinion and order of the district court (Pet. App. 250-320) is reported at 14 F. Supp. 2d 1135.

JURISDICTION

The original judgment of the court of appeals was entered on August 25, 2009. The court of appeals denied rehearing en banc and issued an amended opinion on May 6, 2010. Subsequent petitions for rehearing were denied on September 20, 2010 (Pet. App. 321-322). On December 14, 2010, Justice Alito extended the time within which to file petitions for writs of certiorari to and including January 18, 2011 (Pet. App. 323), and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The conditional cross-petition was filed on February 22, 2011.

STATEMENT

1. Section 1151 of Title 18 classifies three categories of land as "Indian country": "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"; "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired

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[1] Citations in this brief to the petition appendix refer to the petition appendix in No. 10-929.

territory thereof, and whether within or without the limits of a state"; and "(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." For land in any of these three categories, criminal jurisdiction in cases involving tribal members generally rests primarily with the United States and the particular Indian tribe, rather than the State in which the Indian country lies. See 18 U.S.C. 1151-1153. The same distinction "generally applies * * * to questions of civil jurisdiction" as well. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); see *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

2. The Treaty of April 19, 1858, 11 Stat. 743 (Pet. App. 324-336), established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. Pet. App. 5-6. Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee. See Indian General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887); Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. More than 262,000 non-contiguous acres of the Yankton Sioux Reservation were allotted. Pet. App. 8.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Tribe for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which the Tribe agreed to "cede, sell, relinquish, and

convey" its interest in all the unalloted lands—approximately 168,000 acres interspersed among the allotments—within the Reservation for $600,000. Pet. App. 8, 339. Although the Agreement specified that most of the ceded land would be sold to non-Indian settlers, a portion was exempted from such sale and set aside for continued use by the United States for Indian agency, schools, and other tribal-support purposes for as long as necessary. *Id.* at 342-343. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act).

3. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act, by which the Tribe ceded and conveyed all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

The land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act for sale to settlers. The Court therefore found it unnecessary to decide whether the Reservation had been wholly disestablished. 522 U.S. at 358.

4. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive relief precluding the State of South

Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members on (1) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual members, and (2) the lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, which are at present held in trust by the United States for the Tribe. The United States, which had previously participated in the original action as an amicus curiae, intervened in the consolidated action. Pet. App. 202-203.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. Pet. App. 253. The court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within the original 1858 exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of negotiations between the United States Commissioners and the Tribe, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 250-321.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 199-249. It agreed with the district court that the Reservation had not been disestablished. *Id.* at 203. But the court held that the Reservation had

been further diminished to exclude not only the unalloted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe*, but also additional lands that had passed into non-Indian hands. *Id.* at 247.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of reservation diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. Pet. App. 224 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain,'" and "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 225 (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986), and *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Tribe. *Id.* at 229 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to have disestablished or diminished a reservation "must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Id.* at 228 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of

the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. Pet. App. 229-243.

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." Pet. App. 229. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court concluded that Article V, which provided for an optional fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 238-239; see *id.* at 340-341. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 239-240; see *id.* at 239 (Article XVII "signal[ed] a jurisdictional distinction between reservation and ceded land") (quoting *Yankton Sioux Tribe*, 522 U.S. at 350) (brackets in original). And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 240.

The court of appeals likewise found no clear indication of an intent to disestablish the Reservation in the record of the negotiations between the United States and the Tribe. Pet. App. 231-237. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 232. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers," and it viewed such indications as "suggest[ing] the parties did not intend to disestablish the reservation." *Id.* at 233. The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 235-237. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 236.

The court of appeals additionally concluded that "treatment of the Yankton area in the years following passage of the [1894] Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust." Pet. App. 243-244. Among other things, the court of appeals discussed evidence in the record regarding the Tribe's maintenance of a tribal police force and an independent judicial system, and Congress's "definitive and considered step" when, in 1929, it decided to return the lands previously reserved for tribal-support purposes to the Tribe and prohibited the allotment of those lands. *Id.* at 244-246 & n.12.

c. The court of appeals concluded, however, that the 1894 Act intended to diminish the Reservation not only by removing the ceded land, but also other (allotted) land that subsequently passed into the hands of non-Indians. Pet. App. 243, 247. The court stated that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands and gain the ability to sell those lands to non-Indians, and the lands would thus become subject to the civil and criminal laws of the State. *Id.* at 243. The court of appeals did not determine precisely which lands—other than roughly 1000 acres originally reserved in the 1894 Act for tribal-support purposes, which Congress, in 1929, specified should be returned to the Tribe, see Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act)—remained within the surviving Reservation, instead remanding to the district court to make that determination in the first instance. Pet. App. 248-249.

6. The State, the County, and the waste management district (collectively, "petitioners"), and also the Tribe, filed petitions for writs of certiorari. They presented the same issues for review that they present here: petitioners contended, contrary to the court of appeals, that the Reservation had been disestablished; the Tribe contended, contrary to the court of appeals, that the present-day Reservation includes allotted lands that have passed out of Indian ownership. See 99-1490 Pet. 11-29; 99-1683 Pet. 4-22. The United States urged the Court to deny both petitions, U.S. Br. in Opp., Nos. 99-1490 and 99-1683, and the Court denied certiorari. See *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

7. On remand, the district court held that the following lands remained within the Reservation, and were therefore Indian country under 18 U.S.C. 1151(a): (1) land allotted to members of the Tribe in 1894 and held continuously in trust by the United States for the benefit of the Tribe or its members since that time (30,051.66 acres); (2) land taken into trust by the United States for the benefit of the Tribe under the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (6444.47 acres); (3) land reserved to the United States in 1894 and returned to the Tribe pursuant to the 1929 Act (913.83 acres); and (4) Indian-owned fee land that has been continuously in Indian hands since 1894. Pet. App. 162; see *id.* at 82.

The district court held in the alternative that, for two independent reasons, lands in categories 1 and 2 above would be Indian country for jurisdictional purposes even if they were *not* part of a formally designated reservation. First, the court determined that those lands, if not part of a formal reservation, constituted an "informal" or "de facto" reservation, and thus would still be Indian country under Section 1151(a). Pet. App. 153-157. The court observed that under this Court's decisions, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation,'" but instead on "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.* at 153 (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (some quotation marks omitted). The court concluded, based on the evidence of federal superintendence, that the lands met this definition. *Id.* at 156.

Second, the court determined that these lands also constituted a "dependent Indian community" under Section 1151(b). *Id.* at 159-160. "The Supreme Court," it explained, "established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): 'a federal set-aside and a federal superintendence requirement.'" *Id.* at 160 (quoting *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530) (emphasis omitted). The court held, based on the evidence, that the lands satisfied these requirements. *Ibid.*

8. a. The court of appeals affirmed in part and vacated in part. Pet. App. 71-121. It reaffirmed its previous determination that the land reserved for tribal-support purposes in 1894 and returned to the Tribe under the 1929 Act was reservation land. *Id.* at 90-94. It also affirmed the district court's conclusion that two other categories of trust land—allotted land held continuously in trust by the United States and land taken into trust under the IRA—were part of the reservation as well. *Id.* at 97-112.[2] The court of appeals expressly recognized that these latter two categories of land would be considered Indian country even if the reservation had been disestablished. It observed that all parties conceded that the allotted trust lands would be Indian country under Section 1151(c), which specifically addresses allotments. *Id.* at 97-98. And it further observed that the IRA trust land would be Indian country pursuant to 25 U.S.C. 465. Pet. App. 105-107; see *id.* at 106 ("[S]ec-

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[2] The court of appeals noted that the district court had identified, but had not expressly addressed the status of, an additional 174.57 acres of trust land that had been taken into trust under statutes other than the IRA. Pet. App. 82-83, 112. The court of appeals concluded that these lands were "dependent Indian communities" and thus Indian country under Section 1151(b). *Id.* at 112-114.

tion 465 provides the proper avenue for a tribe to reestablish sovereign authority over territory.") (quoting *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005)) (brackets omitted)).

The court of appeals vacated, however, the district court's conclusion that continuously-Indian-owned fee lands are part of the Reservation. Pet. App. 114-116. It deemed the issue unripe because the record was undeveloped; among other things, it was not clear that any such lands existed. *Id.* at 115-116.

b. The panel granted in part petitioners' request for panel rehearing. Pet. App. 52-70. Petitioners' request "focus[ed] on dicta in a single footnote of [the court's] 37 page decision." *Id.* at 54. Petitioners argued that the footnote indicated that a certain set of lands—lands allotted to Indians in 1894 but sold to non-Indians after the enactment of Section 1151 in 1948—were part of the Reservation, and they (along with amici) claimed that various detrimental consequences flowed from that result. *Id.* at 58-59. The court explained that petitioners had "raised a straw man to attack" and were "well aware that the wording to which they object is not part of the judgment in this case." *Id.* at 59-60. The court nevertheless amended and reissued the opinion, removing language that might be "misunderstood" as reaching the issue of allotted lands transferred to non-Indians after 1948, but otherwise leaving the decision unaltered. *Id.* at 56; see *id.* at 1-51 (amended opinion).

ARGUMENT

The court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States.

That fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Nor does it have any significant practical consequence, given the jurisdictional treatment of the specific trust lands at issue in this case. For reasons largely explained by the lower courts, the trust lands are Indian country, and therefore presently subject primarily to federal and tribal jurisdiction rather than state jurisdiction, whether or not the Yankton Sioux Reservation was disestablished by the 1894 Act. Further review of the question presented by petitioners (regarding whether the Reservation was disestablished), as well as the question presented in the conditional cross-petition (regarding the extent of the Reservation), is accordingly unwarranted.

1. In concluding that the Reservation was not wholly disestablished in 1894, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (Pet. App. 225), Congress's intent to diminish or disestablish a reservation must be "clear and plain," under a standard that considers the text of the relevant surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v. *Bartlett*, 465 U.S. 469, 470-471 (1984). "This Court does not lightly conclude that an Indian reservation has been terminated," and it resolves ambiguities in favor of the

tribe. *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975).

There was no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation. The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession and conveyance of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members. Pet. App. 339.[3]

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted (or "surplus") lands would result in the disestablishment of the entire Reservation. Indeed, several

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[3] The County errs in asserting (County Pet. 24-25) that the "cession and sum certain" language contained in these articles gives rise to a "disestablishment presumption." As the decisions in both *Yankton Sioux Tribe* and *Solem* explain, such language creates only a "presumption of *diminishment*" (*i.e.*, that the reservation was reduced by the area sold), not a presumption of *disestablishment* (*i.e.*, that the reservation was eliminated entirely). *Yankton Sioux Tribe*, 522 U.S. at 344 (emphasis added); see *Solem*, 465 U.S. at 470-471. This Court has already applied the diminishment presumption in *Yankton Sioux Tribe* to find that the Reservation was diminished to the extent lands were ceded to the United States for sale to non-Indians. See 522 U.S. at 351. The question now is one of complete disestablishment, and, as explained in the text, the presumption favors the continuation of the reservation, unless congressional intent to the contrary is clearly shown.

provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (Pet. App. 342-343). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." Pet. App. 240.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (Pet. App. 347). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see Pet. App. 239-240 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or

other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (Pet. App. 341). Article XI provided an additional source of funding for those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (Pet. App. 344). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. Pet. App. 239.[4]

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. Pet. App. 232-234; (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1894) (Negotiation Record)). That purpose was consistent with the continued existence of a Reservation. As the district court observed, "[a]t no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." *Id.* at 284.

The negotiation records were submitted to Congress by the Secretary of the Interior to support ratification of the 1892 Agreement. Pet. App. 232. The congressional debates on the ratification did not address the status

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[4] As the court of appeals noted (Pet. App. 238-239), the fund referred to in Articles V and XI "was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent."

of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little").

Subsequent actions by Congress, and the on-the-ground-facts, likewise do not support a conclusion that the Reservation was disestablished. Pet. App. 244. As the court of appeals explained, Congress's decision in 1929 to return certain reserved lands to the Tribe provides some additional evidence that Congress "always intended" to provide a "property site" for tribal-support activities. See *id.* at 244-245. The Tribe additionally presented uncontested evidence that it maintained a tribal police force and an independent judicial system following passage of the 1894 Act. *Id.* at 246 & n.12.

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances.[5] Pet. App. 241. Not only is there no reason for the Court to revisit that conclusion, but, contrary to the State's contention (State Pet. 36-37), review by this Court would

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[5] The State appears briefly to suggest (State Pet. 24-26) that this Court's decision in *Yankton Sioux Tribe*, in combination with the State's interpretation of the record, demonstrates that the Reservation was, in fact, disestablished. The State misinterprets *Yankton Sioux Tribe*. The Court in that case expressly declined to reach the disestablishment issue, 522 U.S. at 358, and recognized that certain provisions of the 1854 Act cut *against* disestablishment, *id.* at 350. See p. 15, *supra*.

not provide any useful guidance to lower courts in deciding other Indian-country cases. Other cases would necessarily involve different treaties between the United States and the particular tribe; different statutes; different historical circumstances; different subsequent settlement activity; and different treatment of the opened lands by the United States, the State, and the relevant tribe. Cf. *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). Certiorari is accordingly unwarranted.

2. Petitioners contend (State Pet. 16-26; County Pet. 16-35; SMRWMD Pet. 6-11) that the court of appeals' decision conflicts with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999), and with this Court's decision in *DeCoteau* v. *District County Court*, *supra*.[6] Petitioners made the exact same contention in their previous petition for certiorari on the question presented here, which the Court denied. See 99-1490 Pet. 11-20; *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000). The contention is mistaken.

a. Contrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical. Both hold that allotted lands within the exterior boundaries of the original

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[6] The Southern Missouri Recycling and Waste Management District additionally contends (SMRWMD Pet. 11-13) that the court of appeals' decision in this case conflicts with that court's previous decision in *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). Even assuming such a conflict existed, it would be for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Yankton Sioux Reservation now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. 599 N.W.2d at 365. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. *Id.* at 365-366. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. *Id.* at 366. The land had been sold in fee to a non-Indian, and was neither trust land, a dependent Indian community, nor property held by the Tribe. *Id.* at 377-378.

In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. *Bruguier*, 599 N.W.2d at 378. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 365. The court concluded that such lands do not constitute Indian country. *Ibid.*

The court of appeals in this case likewise held that formerly allotted lands that now are owned by

non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247; see *id.* at 17. Thus, as the court of appeals recognized, *Bruguier* addressed "a category of land" that the court of appeals had "held was *not* part of a diminished reservation." *Id.* at 23 n.7 (emphasis added). Under the holdings of both the Supreme Court of South Dakota and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier*, and indeed has jurisdiction over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership.

Nor is any disagreement evident between the court of appeals and the Supreme Court of South Dakota that trust lands within the original exterior boundaries of the Reservation *are* Indian country. The Supreme Court of South Dakota stated that the land at issue in *Bruguier* was not trust land, 599 N.W.2d at 378, and repeatedly recognized that certain lands might be Indian country even without a formal reservation, see *id.* at 370-371, 376, 378. For reasons explained at pp. 24-30, *infra*, federal law does indeed classify the trust lands as Indian country irrespective of formal reservation status.

The decision of the court of appeals in this case thus does not present a "conflict[] with a decision by a state court of last resort," Sup. Ct. R. 10(a), of the sort that warrants this Court's review. The Court has stated that it "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (citation omitted)). Where, as here, there is a difference in reasoning but not result, this Court's intervention is unwarranted.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Tra-

verse Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ in several significant respects from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (Sisseton-Wahpeton Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The Sisseton-Wahpeton Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The Sisseton-

Wahpeton Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. 318; see *Yankton Sioux Tribe*, 522 U.S. at 350 (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the Sisseton-Wahpeton Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the Sisseton-Wahpeton Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate their Reservation. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." Pet. App. 220-221. For example, this Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," *DeCoteau*, 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.16. In contrast, the "circumstances sur-

rounding the negotiation of the 1892 Agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation." Pet. App. 221.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the Dawes Act or was received by the Yankton Sioux under the 1894 Act. The Dawes Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. Pet. App. 262 (citing 24 Stat. 388). In contrast, each Sisseton-Wahpeton member, "regardless of age or sex," received a 160-acre allotment. *DeCoteau*, 420 U.S. at 435; see *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed significantly from the agreement here, because the Sisseton-Wahpeton, in "exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." Pet. App. 221. The Yankton Sioux did not.[7]

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[7] The State argues (State Pet. 22) that present-day demographics also show a similarity between this case and *DeCoteau*. Even assuming present-day demographic evidence could suffice to show disestablishment in 1894, the State misinterprets the significance of the evidence

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The question presented by petitioners regarding the Reservation's disestablishment does not merit review for the additional reason that it is of little practical consequence. The only lands that the court of appeals found to be Indian country under 18 U.S.C. 1151(a) based on their reservation status were (1) allotted lands held in trust by the United States for tribal members; (2) lands acquired by the United States since 1934 and held in trust for the Tribe pursuant to the IRA; and (3) lands that were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe. See p. 11, *supra*. All of these lands would be Indian country even if the Reservation *had* been disestablished, as petitioners contend.[8]

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here. As the figures cited by the State demonstrate, whereas Indians were less than 10% of the relevant population in *DeCoteau*, they make up roughly one-third of the population here. See Pet. App. 315 (district court emphasizing demographic differences between this case and *DeCoteau*).

[8] To the extent that the State's criticism (State Pet. 26-35) of the court of appeals' decision could be read to touch upon these alternative grounds for Indian-country status, such arguments are not encompassed within the question presented in the State's petition, which seeks review only of "[w]hether the Act of 1894 disestablished the Yankton Sioux Reservation." State Pet. i.

a. The vast majority of the land at issue (over 30,000 acres) falls within the first category enumerated above: allotted lands held in trust for tribal members. Pet. App. 12-13. Petitioners conceded below that even if this land were not reservation land under Section 1151(a), it would still be Indian country under Section 1151(c), which expressly addresses allotments. See *id.* at 28, 226. The State argues (State Pet. 27) that resolution of the disestablishment question is still important to the status of these lands, because, if there is no reservation, then these lands would cease to be Indian country if they were ever removed from trust status. But as a practical matter, very little of this land has been removed from trust status in recent years, and there is little reason to expect that much, if any, of it will be in the near future. See Gov't C.A. App. 175-197 (less than one allotment has been removed from trust in each of the last two decades).

b. Most of the land at issue that does not fall into the first category falls within the second: some 6000 acres of lands placed into trust under the IRA. Pet. App. 12-13. The court of appeals correctly concluded that this category of land is Indian country whether or not the formal Reservation was disestablished. *Id.* at 36-37. The IRA authorizes the Secretary of the Interior to acquire "land for Indians" "within *or without* existing reservations." 25 U.S.C. 465 (emphasis added). The court of appeals recognized, quoting this Court's decision in *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005), that the IRA "provides the proper avenue for a tribe to reestablish sovereign authority over territory." Pet. App. 36 (brackets omitted); see *id.* at 36-37 (citing *Chase* v. *McMasters*, 573 F.2d 1011, 1018 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *United States* v.

Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); and *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985), for the proposition that IRA trust lands are Indian country). Petitioners do not challenge that conclusion in their identical questions presented, and nothing this Court decides on the disestablishment issue on which petitioners do seek review would place these lands within state jurisdiction.[9]

c. The third category of land at issue—roughly 900 acres of "agency trust land," reserved for the Tribe's benefit in 1894 and restored to the Tribe under the 1929 Act—comprises less than three percent of the total land, Pet. App. 12-13, and thus would not by itself merit this Court's attention. In any event, this land would qualify as an "informal" or "de facto" reservation under this Court's precedents, even if no formal Reservation existed. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), this Court considered the status of lands that were not within the boundaries of a formally recognized reservation but that were held in trust by the United States for the benefit of a tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.* (citation omitted); see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for the purposes of federal criminal juris-

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[9] As noted below, see p. 27, *infra*, these lands also meet the standards for an informal reservation more generally.

diction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

The district court expressly recognized that the other two categories of land at issue in this case—the allotted trust lands and IRA trust lands—meet the standards for an informal reservation. Pet. App. 153-157. The district court concluded, based on the evidence presented, that "the federal government has validly set apart" those lands "for use of the Yankton Sioux Indians," observing that the federal Bureau of Indian Affairs handles leases and rents, and the Federal Bureau of Investigation exercises criminal jurisdiction, over that territory. *Id.* at 156. Similar considerations demonstrate that the agency trust land meets the standards for an informal reservation as well: the land was reserved for the purpose of providing "aid and education to tribal members so long as they were needed," *id.* at 21 (citation omitted); see 28 Stat. 316 (Pet. App. 342-343); was later "reinvested in the Yankton Sioux Tribe" when "no longer required for agency, school, and other purposes," Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167; was exempted from allotment, thereby preventing its transfer to non-Indians, *ibid.*; see 69 Cong. Rec. 8837 (1928) (Sen. McMaster of South Dakota explaining that the lands would not be vulnerable to sale for taxes, and instead that the act would reinvest the lands "not for allotment but for reservation purposes, buildings, and so forth"); is held in trust for the Tribe with federal superintendence of leasing; and has been subject to federal criminal jurisdiction, Pet. App. 246.

d. Moreover, any tribal trust lands determined not to constitute either a formal or informal reservation under Section 1151(a) would satisfy the requirements of Section 1151(b) as a dependent Indian community. The district court expressly recognized that the federal government's treatment of the allotted trust lands and IRA trust lands qualified them as dependent Indian community under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). See Pet. App. 159-160. The analogous treatment of the agency trust land would similarly qualify it as dependent Indian community as well.

e. Because the lands in question would be Indian country if the formal Reservation no longer existed, there is no merit to the State's contention (State Pet. 35) that the court of appeals' decision has "created an untenable situation for those who must attempt to live in and govern the disputed area." Petitioners and amici raised a similar argument in support of rehearing below. Pet. App. 59. The court of appeals, in denying that request, quoted the government's observation that "despite a decade of experience with a * * * checkerboard Reservation" after the court of appeals' original ruling that the Reservation had not been disestablished, "this area of South Dakota has not experienced any of the problems described by the State, County, or *amici*." *Ibid.* (citation omitted).

In point of fact, because of the alternative grounds for Indian-country status of the lands at issue, the checkerboard pattern pre-dates the court of appeals' ruling on disestablishment, and would survive any decision on that issue by this Court. See, *e.g.*, Pet. App. 245-246 (noting longstanding federal exercise of criminal

jurisdiction over trust lands).[10] As this Court has previously recognized, a checkerboard jurisdictional pattern is not necessarily impracticable. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (parcel-by-parcel determinations that state's tax assessor was required to make on checkerboard reservation were "not impracticable" and "do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally-owned, state-owned, and church-owned lands"). And the evidence in this case—which shows that the federal government has long exercised criminal jurisdiction over lands found by the court of appeals to constitute part of the Yankton Sioux Reservation—demonstrates that the pat-

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[10] One amicus brief implies that the question presented nevertheless has relevance because the Tribe's regulatory authority differs depending upon whether the land at issue is Indian country under Section 1151(c) or because it is part of a reservation. See Charles Mix Electric Ass'n et al. Amicus Br. 10-11. None of the cases cited by the brief, however, expressly discusses Section 1151(c), and the brief omits to discuss whether the other alternative grounds (*e.g.*, informal-reservation status) for considering this land to be Indian country might also give rise to differences in tribal regulatory authority. *Ibid.* The courts below neither addressed nor recognized any relevant jurisdictional distinctions between different types of Indian country, and no such issue is presented for this Court's review. In any event, this Court's precedents suggest that the precise type of Indian country does not matter for jurisdictional purposes. The same general principles of immunity from state taxation apply, for example, on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179-181 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511; or is an allotment still held in trust or restricted status, see *Sac & Fox Nation*, 508 U.S. at 123.

tern here has not proven to be unworkable. Pet. App. 245-246. For that reason, and because the current jurisdictional boundaries should remain irrespective of a decision by this Court on the question presented, certiorari is unwarranted.

4. Petitioners, and some of their amici, suggest that certiorari is necessary in order to address the status of an additional category of land, namely, allotted land that passed into non-Indian hands after 1948, when 18 U.S.C. 1151 was enacted. See State Pet. 34-35; County Pet. 19; Cities' Amicus Br. at 1 n.2 & App.; Colin Soukup et al. Amicus Br. 4-5; Wagner Community Sch. Dist. Amicus Br. 2. But as the court of appeals made clear in response to the rehearing petitions, no issue regarding such land was "actually litigated or decided in this case." Pet. App. 55. Indeed, the panel revised its original opinion to eliminate any possible implication that any such issue had been decided. *Id.* at 56. Because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), petitioners' arguments about this fourth category of land provide no reason to grant certiorari.

5. Finally, should the Court nevertheless decide to grant certiorari to address the disestablishment question, it should deny the Tribe's conditional cross-petition. The conditional cross-petition presents the question whether the present-day Reservation includes all lands that were within the original 1858 Reservation boundaries, except for those ceded to the United States in the 1894 Act. See Conditional Cross-Pet. i. The additional lands at issue in the Tribe's conditional cross-petition are once-allotted lands that passed out of trust status and were sold to non-Indians. The United States has long exercised jurisdiction only over trust lands, not

these. Pet. App. 246-247. Although the United States supported the Tribe's position on this issue, the question does not warrant certiorari. Like the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this particular case. See Sup. Ct. R. 10. There is no need to review the disestablishment question, but even if the Court did grant review of that question, there would be no need to expand the scope of review to include other aspects of the court of appeals' reservation-specific and fact-bound ruling.

As the court of appeals observed, "both sides have followed an all or nothing strategy" in this case. Pet. App. 248. The outcome now lies between those poles in a manner that essentially preserves the jurisdictional status quo as it has long existed. Review of any or all of the court of appeals' decision is unwarranted and would serve little purpose. The Court therefore should deny certiorari, just as it did 11 years ago when petitioners and the Tribe filed certiorari petitions raising the same issues at an earlier stage of this litigation.

CONCLUSION

The petitions for writs of certiorari should be denied. If any of the petitions are granted, the conditional cross-petition should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
KATHRYN E. KOVACS
KATHERINE W. HAZARD
Attorneys

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Nos. 10-929, 10-931, 10-932, and 10-1058

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

SOUTHERN MISSOURI RECYCLING
AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.

PAM HEIN, STATE'S ATTORNEY
OF CHARLES MIX COUNTY, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

YANKTON SIOUX TRIBE, et al.,
Cross-Petitioners,

v.

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS GOVERNOR AND ATTORNEY GENERAL

CHARLES D. MCGUIGAN*
Chief Deputy
Attorney General
State of South Dakota
Charles.McGuigan@state.sd.us
*Counsel of Record

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Cross-Respondents Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The Yankton Sioux Tribe, in its Conditional Cross-Petition (CCP), argues that, if South Dakota's Petition in No. 10-929 is granted, bringing the question of whether the Yankton Sioux Reservation has been disestablished before the Court, it should be allowed to argue for its preferred configuration of a diminished reservation.

The Tribe has indicated that it will argue for its diminished reservation configuration on the same evidence which the State contends supports disestablishment. CCP 4. For the reasons set forth below, and in the State's Petition in No. 10-929, the Tribe's position on the merits is mistaken. The United States, in seeming agreement that the Tribe's position lacks merit, now urges denial of this Conditional Cross-Petition. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-958 at 32. Nonetheless, the equities and practicalities of the situation persuade the State to support the grant of this Conditional Cross-Petition, in the event that the Petition in No. 10-929 is also granted, to allow the full range of arguments to be presented.

STATEMENT OF THE CASE

In 1858 a "Yankton Sioux Reservation" of roughly 430,000 acres was created out of a larger territory. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). The reservation area was then subjected

to allotment pursuant to the Dawes Act and a subsequent act. *Id.* at 336. Roughly 262,000 acres were removed from common ownership and allotted to individual Indians; 168,000 acres were unallotted, and remained in common ownership. *Id.* This "unallotted" land was the "surplus land."

A Yankton Indian Commission was appointed in 1892 and, that same year, negotiated a "cession and sum certain" agreement with the Yankton Sioux Tribe by which the Tribe agreed to cede all of its unallotted land then held in common (the 168,000 acres known as "surplus land") for a sum certain of $600,000. 1894 Act, Articles I and II, Pet. App., No. 10-929 at 339. As a consequence, the Tribe retained no land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. Because individual tribal members quickly disposed of their allotments and the United States itself sold allotments of deceased and incompetent Indians, the acreage held by individuals in allotted status declined from 262,000 acres to 43,358 acres by 1930. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of the first trial in 1995, 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians; the Tribe had acquired about 6,000 acres. *Yankton Sioux Tribe*, 522 U.S. at 339.

The Tribe's Question Presented asks this Court to recognize a "reservation" frozen in 1894, excluding only the surplus ceded land (on the basis of this Court's decision in *Yankton Sioux Tribe*, 522 U.S. at 358) but including all 262,000 acres of allotted land,

even though the Indian title to 88 percent of those lands has been extinguished and the lands have been conveyed to non-Indians. The result would be a "reservation" which would include roughly 30,000 acres of allotted lands owned by tribal members and 230,000 acres of lands owned by non-Indians. These parcels would be intermixed with the 168,000 acres of land ceded to the United States, acquired by non-Indians, and declared to be non-reservation by this Court in *Yankton Sioux Tribe*.

As unlikely as the configuration seems, it has appeared before, in very similar form, in this litigation. Immediately after this Court's decision in 1998, the Bureau of Indian Affairs apparently conceived it, and the District Court, at the urging of the Tribe and the United States, adopted a reservation configuration which consisted mainly of the allotted lands. *Gaffey I*, Pet. App., No. 10-929 at 253, 318-20. The Eighth Circuit, however, quickly overturned this decision. *Gaffey II*, Pet. App., No. 10-929 at 249. It is notable that, insofar as appears from the record, no map of this configuration had been prepared until after this Court's decision in *Yankton Sioux Tribe* in 1998. Even now, the Tribe fails to present a map to this Court which identifies the lands which it asserts would constitute "reservation" under the theory of the Conditional Cross-Petition.

DISCUSSION

The Tribe's Conditional Cross-Petition asks this Court to create a reservation configuration unknown to Indian law. Even so, the State does not object to the grant of the Petition, in the event that the State's Petition in No. 10-929 is granted, because, as the Tribe asserts, the arguments made in its Conditional Cross-Petition substantially overlap the arguments made by the other parties, and the Court's final determination may well benefit from consideration of all potential points of view.

A. The relief sought through grant of the Conditional Cross-Petition would create a configuration of a "reservation" never before seen in the law.

The reservation configuration sought by the Conditional Cross-Petition is unique. Except for the one year and two weeks in which the 1998 District Court's opinion, which adopted this "reservation," was effective, the Conditional Cross-Petitioners have not identified a single case, nor did the courts below, in which Congress was found to have created a "reservation" without external boundaries, which was comprised of roughly 90 percent fee land, 10 percent trust land of some kind, and intermingled with over 160,000 acres of non-reservation ceded land.

B. The Conditional Cross-Petition fails to articulate a coherent theoretical basis for granting the relief it seeks.

This case, from the first, has addressed the question of whether the Yankton Sioux Reservation has been disestablished or, at the least, diminished. This Court, in its 1998 decision, determined that the reservation *has* been at least diminished, and the exterior boundaries extinguished, by determining that the surplus land ceded to the United States by the 1894 Agreement was no longer "reservation." *Yankton Sioux Tribe*, 522 U.S. at 345, 347, 358. This Court found, however, that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case." *Id.* at 358. As demonstrated below, the opinions of this Court nonetheless illuminate the path which should be taken to ultimately resolve this case.

1. The operative language of the Yankton Agreement is precisely suited to "termination" but the Conditional Cross-Petition fails to even acknowledge that language.

The language of a surplus land agreement is the most important factor in determining whether disestablishment has taken place, and of that language, the "operative language" is of primary significance. *See Yankton Sioux Tribe*, 522 U.S. at 333; *Hagen v. Utah*, 510 U.S. 399, 412-14 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 593 n.15, 608 (1977).

The "operative language" of the Yankton Agreement is its "'cession' and 'sum certain' language" which this Court held is "'precisely suited' to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). Virtually identical operative language in an 1891 Act had been held to disestablish the Lake Traverse Reservation in *DeCoteau*. For the Conditional Cross-Petition to succeed, it must, at a minimum, articulate a compelling reason to ignore the Yankton Agreement's operative language and this Court's interpretation of that language. The Conditional Cross-Petition fails to do so, because it fails even to *acknowledge* this language.[1]

2. The subsidiary language in the Yankton Agreement does not significantly undermine its operative language.

Instead of confronting the "operative language" of the 1894 Act, the Conditional Cross-Petition improperly assigns three other sections of the Act primary significance. CCP 13-14. This approach ignores *Yankton Sioux Tribe's* comparative analysis of the

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[1] The Tribe in its Brief in Opposition, Nos. 10-929, 10-931, 10-932, likewise fails to directly address the "cession and sum certain" language but does argue, *id.* at 13, that the "text of the 1894 Act" applied only to "'ceded'" lands, a clear error given that this Court and the Eighth Circuit have both found that the 1894 Act removed the 1858 reservation boundaries. *Yankton Sioux Tribe*, 522 U.S. at 345, 347, *Gaffey II*, Pet. App., No. 10-929 at 203, 223, 224, 248.

effect of subsidiary and operative language in a cession agreement. In *Yankton Sioux Tribe*, the United States and the Tribe had "rest[ed] their argument" on the "saving clause in Article XVIII of the 1894 Act." 522 U.S. at 345 This Court, however, refused to give the "savings clause" such effect and limited it to preservation of annuities. *Id.* at 347-48. The Court's decision emphasizes the primacy of operative language even over very strong language in other subsidiary provisions, contrary to the position of the Conditional Cross-Petition.

In any event, the subsidiary provisions relied upon do not carry the weight assigned to them. The Conditional Cross-Petition argues that Article V of the 1894 Act provides for "continued funding of tribal courts of justice and other local institutions" and then strongly implies that this Court found "that provision" i.e., Article V, "reflects an expectation that the Tribe would maintain a sovereign existence" and so "'counsel[s] against finding the reservation terminated.'" CCP 13 (quoting *Yankton Sioux Tribe*, 522 U.S. at 350). In fact, *Yankton Sioux Tribe*, 522 U.S. at 350, does *not* discuss Article V, nor does Article V appear even to be mentioned in *Yankton Sioux Tribe*. Furthermore, Article V itself does *not* refer to "tribal courts of justice," as CCP 13 claims. *See* 1894 Act, Art. V, Pet. App., No. 10-929 at 340-41. Rather, Article V refers to "courts of justice and other local institutions," *Id.* The reference is thus to support of "local," i.e., city, county and state, and not "tribal" courts,

contrary to the position of CCP 13. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 697, n.16 (1993).

Next, the Conditional Cross-Petition relies on Article VIII which "reserved from sale to settlers" certain lands which had been "ceded" to the United States but were then "occupied by the United States for agency, schools and other purposes." CCP 13. *See* 1894 Act, Art. VIII, Pet. App., No. 10-929 at 342-43. The lands could be sold to settlers after they were "no longer required for such purposes." *Id.* at 343. The Tribe urges that Article VIII somehow demonstrates the continued existence of a "reservation" but the argument fails. Retention of such areas was "common, even for a terminated reservation." *Bruguier v. Class*, Pet. App. 10-929 at 187. Similar agency and school lands were reserved at the Lake Traverse or Sisseton Reservation, yet it, like areas of other reservations, was found disestablished. *See DeCoteau*, 420 U.S. at 435 n.16, 438 n.19; *Bruguier*, Pet. App. 10-929 at 187. *See also Rosebud*, 430 U.S. at 622 (Marshall, J., dissenting and referring to allowance for reservation of land in disestablished counties for "Indian schools, religious missions and service agencies"); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from reservation); 36 Stat. 440 (1910) (allowing, in Section 1, Secretary to reserve lands for "agency, school and religious purposes" in the area of Pine Ridge Reservation later held disestablished in *United*

States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975)).

Further, the "agency" lands were "unallotted" and "ceded," 1894 Act, Article I, Pet. App., No. 10-929 at 339; *Gaffey II*, Pet. App., No. 10-929 at 209, and this Court has found that "unallotted lands ceded" to the United States did not retain "reservation" status. *Yankton Sioux Tribe*, 522 U.S. at 342. Lands effectively declared to be *non-reservation* could hardly support the existence of a "reservation."

In addition, the Conditional Cross-Petition elevates the significance of the temporary retention of surplus lands. Such retention merely indicated that the United States perceived that it retained a responsibility to tribal members on the remaining "allotted lands" and in the area of the former reservation and that it would continue to supply services to them. *See Pelican*, 232 U.S. at 449-50. That is not enough to support the existence of a "reservation." As *Alaska v. Native Village of Venetie Tribal Government* found, the "mere provision of 'desperately needed' social programs" cannot support a finding of Indian country. 522 U.S. 520, 534 (1998). *See also* Report of Agent for Sisseton Agency (1900) (referencing, in 1900, at the Lake Traverse or Sisseton Reservation, disestablished nine years before in 1891, an "industrial boarding school," an "office" for the agent, and services provided by the

agency related to leasing and policing. 1998 JA 666-67.[3]

Finally, the Conditional Cross-Petition cites Article XVII, the liquor provision, as demonstrating the existence of a "reservation." CCP 13 *See* 1894 Act, Art. XVII, Pet. App., No. 10-929 at 347. This argument ignores the fact that this Court found that a similar liquor provision *supported* the disestablishment of Mellette County from the Rosebud Sioux Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47. The Conditional Cross-Petition also ignores the fact that liquor had been illegal in Indian country since 1832. Testimony of Herbert Hoover, 1995 Transcript at 73. Article XVII was unnecessary if the status of the lands had not been altered from reservation to non-reservation by the 1894 Act.

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[3] The Tribe at CCP 6 mischaracterizes the agency lands, labeling them "reserved agency trust lands" in 1929. These lands, however, had been ceded to the United States and were assuredly not in "trust" from 1894 until at least 1929 Indeed, the Solicitor found that the lands had been conveyed to the United States in 1894 "free and clear of all claims of the Indians." Opinions of the Solicitor, M-27671 (Mar. 1, 1934), 1998 JA 571. (Citations to documents follow the form set out in Petition, No. 10-929, at 5 n.2).

3. The relinquishment of all tribal land in common signaled the loss of a "critical component of reservation status" and not the retention of "reservation" status.

The Conditional Cross-Petition argues that the mere creation of allotments and the desire expressed by Government negotiators that individual Indians would retain their allotments signaled retention of "reservation" status. CCP 13-14. This approach misinterprets the occurrences of the late 1800's and the critical role of "land in common." After 1858, the Tribe held roughly 430,000 acres of land in common. Allotment is the process whereby the United States accomplished the permanent transfer of the part of the tribal land held in common to individual Indians. *Gaffey II*, Pet. App , No. 10-929 at 209-10; Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* (2005 Edition). Allotment diminished the area of land held in common by the Tribe by 262,000 acres. *See Yankton Sioux Tribe*, 522 U.S. at 336. The United States then obtained the "cession" of the remainder of the land in common – 168,000 acres – by way of a "sum certain" agreement in 1894. 1894 Act, Arts. I and II, Pet. App., No. 10-929 at 339. Therefore, after 1894, the Tribe retained *no* land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. This is critical because, as *Yankton Sioux Tribe* finds, by failing to retain any land in common, a "critical component of reservation status" was lost. 522 U.S. at 346. Allotment and cession of land held in common worked in tandem to eliminate this critical

component of "reservation" status. *See id.*; *Bruguier*, Pet. App., No. 10-929 at 182-85.

The approach of the Conditional Cross-Petition also confuses the function and history of an "allotment" with that of a "reservation." While both are "Indian country," an "allotment" and a "reservation" are not the same. "Reservation" lands retain their reservation status regardless of their ownership; "allotments" on the other hand, retain their allotted status only so long as their "Indian title" is retained. 18 U.S.C. §§ 1151(a), (c). As *Venetie* finds, "allotments" are "parcels of land created out of a diminished Indian reservation and held in trust . . . for the benefit of individual Indians." 522 U.S. at 529. In the case of the Yankton area, the steady historical increase in state jurisdiction is the story of the surrender of 220,000 acres of individual allotments and their loss of "Indian title." *See Bruguier*, Pet. App., No. 10-929 at 190-94. *See also Yankton Sioux Tribe*, 522 U.S. at 357. The attempt of the Conditional Cross-Petition to make an allotment equivalent to a "reservation" should fail.

The Conditional Cross-Petition also incorrectly implies that the Government made a determined effort to cause tribal members to retain their allotments and that this somehow signaled "reservation" status for the allotments. The record shows, to the contrary, that roughly 230,000 acres of the original 262,000 acres of allotted land have left allotted status. *Yankton Sioux Tribe*, 522 U.S. at 339. Not only did tribal members quickly dispose of their allotments,

but the United States itself actively sought the end of allotted status through the regular sales of inherited lands and lands of non-competents to non-Indians, 1998 JA 821-34, through the so-called federal forced fee policy, 1995 Transcript 232; 1998 JA 920-23, by allowing the twenty-five year trust period to expire, 1998 JA 1163-64, and otherwise.

C. The jurisdictional history of the area is inconsistent with reservation status.

The Conditional Cross-Petition is bereft of evidence or even argument regarding the jurisdictional history of the lands for which it seeks to establish "reservation" status, although such history is important in the analysis. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Rosebud*, 430 U.S. at 603-05. The federal and state courts have consistently found that the State, not the federal government or the Tribe, has exercised jurisdiction over non-Indian fee lands within the former boundaries. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Gaffey II*, Pet. App., No. 10-929 at 245-47; *Bruguier*, Pet. App., No. 10-929 at 190-92. The tribal proposal, if adopted by this Court, would radically alter these arrangements and the State would be deprived of jurisdiction over all of the lands held in allotted status in 1894, even though over roughly 230,000 acres of former allotted land are now held in fee by non-Indians. Indeed, even the United States acknowledges that it has "long" not exercised

jurisdiction over non-trust lands. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-1058, at 30-31.

The Tribe's argument is doubly weakened in that, until recently, the Tribe itself had claimed only a small amount of land or reservation. Its 1962 Constitution "defines the Tribe's territory to include only those tribal lands within the 1858 boundaries 'now owned' by the Tribe." *Yankton Sioux Tribe*, 522 U.S. at 357 (quoting Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, § 1). Only in 1990, almost a century after the 1894 Act, did the Tribe amend its Constitution to claim "all lands and waters . . . within the exterior boundaries of the 1858 Treaty." 1998 JA 1129.[3]

CONCLUSION

The State has respectfully requested this Court to grant certiorari in its Petition in No. 10-929. The State agrees that grant of the Conditional Cross-Petition is appropriate in the event that its Petition is granted, in that such a grant will enable all parties to

[3] The Tribe is incorrect insofar as it asserts, without citation of evidence, that all the parties have become "adjusted" to the Eighth Circuit ruling CCP 3, 11 That much is clear from the Amicus Briefs already submitted. The assertion, moreover, undermines, rather than supports, the grant of the relief requested by this Conditional Cross-Petition.

offer the most complete analysis of the facts and law possible.

Respectfully submitted,

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN P. GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Cross-Respondents Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota

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No. 10-929

In The
Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,

Petitioners,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Charles.McGuigan@state.sd.us

Counsel for Petitioners
Dennis Daugaard,
Governor of South Dakota,
and Marty J. Jackley,
Attorney General of South Dakota

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court unanimously reversed an Eighth Circuit decision holding that the 1894 statute ratifying an agreement between the Yankton Sioux Tribe and the United States did not even diminish the Yankton Sioux Reservation. The Court added that, although it was not deciding the issue, the statute's "'cession' and 'sum certain' language is 'precisely suited' to terminating reservation status." *Id.* at 344. On remand, in a series of decisions culminating in *Podhradsky IV*, Pet. App. 1, the Eighth Circuit held that the reservation nonetheless continues to exist – in a configuration unknown to the law, in which the "reservation" has no external boundaries, but in which each parcel of allotted trust and other trust land constitutes its own permanent "mini-reservation." Certiorari is warranted because that decision directly conflicts with a decision of the South Dakota Supreme Court, directly conflicts with *Yankton Sioux Tribe* and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and unsettles the jurisdictional status of more than 40,000 acres of land.

Both the Tribe and the United States nonetheless insist that the case is "factbound" and so does not merit the Court's consideration. The conflicts are genuine, however, as are the real world consequences. The novel patchwork reservation without any external boundaries produced by the Eighth Circuit decision is permanent, for land that is Indian country under 18 U.S.C. § 1151(a) as part of reservation

remains part of the reservation even when sold to non-Indians.

ARGUMENT

A. The Eighth Circuit has decided an important federal question in a way which conflicts with the decision of the South Dakota Supreme Court.

In *Bruguier v. Class*, the South Dakota Supreme Court held that the Yankton Sioux Reservation has been disestablished. Pet. App. 164. In *Podhradsky IV*, the Eighth Circuit held that the Yankton Sioux Reservation has not been disestablished. Pet. App. 1. The conflict could hardly be more direct. The United States nonetheless asserts that the two decisions are not in conflict because the South Dakota Supreme Court's "actual holding" concerned only whether certain former allotted land remained Indian country. U.S BIO 19. *See* Tribe BIO 22. That position is untenable, and mistakes the legal rule adopted in *Bruguier* (disestablishment) with the court's application of the rule (the former allotted land therefore did not remain Indian country).

Bruguier unequivocally identified the issue before it as whether the reservation had been terminated or disestablished. The court distinguished its earlier decision in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997), which addressed whether the reservation had been "*diminished*," with the question then before it, which

was whether the reservation was "*disestablished*." Pet. App. 176, n.11. *Bruguier* answered the question by reviewing at length the same materials and factors as the Eighth Circuit did: the history of the reservation, including the Tribe's negotiations with the United States; the provisions of the Yankton Agreement, including the "cession and sum certain" language and Articles VIII and XIV; and the use and treatment of the land in subsequent years. Pet. App. 179-96. Based on its exhaustive analysis, *Bruguier* declared that the "historical context" pointed "to an understanding that the reservation would no longer continue to exist," *id.* at 190; that the language in the Yankton Agreement was equivalent to that of the Lake Traverse Agreement, which "signaled termination," *id.* at 181; that the congressional intent to "terminate" the Lake Traverse Reservation is the "same intent" as "shown in the Yankton Reservation sale," *id.* at 196; and that, in sum, the "Yankton Sioux Reservation was effectively terminated by the 1894 Act." *Id.* at 197.

The South Dakota Supreme Court did not engage in this detailed inquiry on a lark. Rather, its disestablishment holding provided the basis for ruling that the land on which Bruguier committed his crime – allotted land that had passed into the hands of non-Indians – was not Indian country. *See* Pet. App. 176-79, 197. The court recognized that such lands do not constitute Indian country under 18 U.S.C. § 1151(c), and therefore could be Indian country only if they "compose part of a permanent reservation under 18 U.S.C. § 1151(a)." Pet. App. 177. They do not, found

the court, because the reservation no longer exists: it has been disestablished.

It does not matter whether, as the United States and the Tribe insist, the South Dakota Supreme Court could have reached the same result through a different route (by assuming the continued existence of the reservation, but ruling that allotted lands that fell out of Indian hands are not part of it). The court was not obligated to take that different route, and the United States and the Tribe cite no authority for the proposition that a court's ruling on an issue essential to its disposition is not an "actual holding" because Monday morning quarterbacks can posit an alternative line of reasoning.

The Eighth Circuit's decision in *Podhradsky IV* directly conflicts with the South Dakota Supreme Court's decision in *Bruguier*. And as the Petition explained, Pet. 19, conflicts between federal courts of appeal and state high courts are a primary basis for this Court's certiorari jurisdiction.

B. The Eighth Circuit's decision conflicts with *Yankton Sioux Tribe* and *DeCoteau*.

Yankton Sioux Tribe, 522 U.S. at 344, found that the "terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*, *supra* at 445, and, as in *DeCoteau*, the 1894 Yankton Act ratified a negotiated agreement supported by a majority of the Tribe." The Eighth Circuit decision

cannot be reconciled with that finding, *see* Pet. 20-26, and the United States' and the Tribe's effort to defend it fails.

Both the United States and the Tribe attempt to avoid *DeCoteau* by arguing that the 1894 Yankton Agreement and its "cession and sum certain" language concerned only the ceded land. U.S. BIO 14; Tribe BIO 13. That was not true in *DeCoteau*, and it is not true here. This Court found, as did the Eighth Circuit, that the language of the 1894 Yankton Act removed the external boundaries of the reservation, disproving the notion that the Act concerned only a land purchase. *Yankton Sioux Tribe*, 522 U.S. at 345-47; *Gaffey II*, Pet. App. 203, 223, 224, 248. Moreover, the removal of the boundaries in itself ought to have disposed of the case, for there is no precedent for a finding that Congress meant to create hundreds of mini-reservations within borders it had removed, as *Podhradsky IV* found. *See generally Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998).

The Tribe suggests that the *Podhradsky IV* configuration is typical, citing *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989); and *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1530. Tribe BIO 30. Those cases are easily distinguishable because in each the external boundaries remained intact. Further, the Tribe cites no authority in support of its distinguishable Red Lake Reservation claim (or its other claims). *Id. See Nord v. Kelly*, 520 F.3d 848, 857-59 (8th Cir. 2008) (Murphy, J. concurring) (Red Lake Reservation has

"unique legal status"; area was never ceded and "all lands are held communally by the tribe.").

Both the United States and the Tribe find special importance in the Commissioner's perceived emphasis on the cession, from the Tribe, of only *unallotted* lands. U.S. BIO 16; Tribe BIO 4. The argument ignores that the Tribe had available for sale *only* the unallotted lands, owned by the Tribe. Allotment had eliminated "any tribal property interest" in the allotted lands and allotted lands could not be sold by the Tribe. Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* 195 (2005 Ed.). *See also Gaffey II*, Pet. App. 209. The United States, by first allotting the area and then acquiring the remaining unallotted land, eliminated the tribe's land in common. The Commissioners accordingly told Congress "'now that [members of the Tribe] have been allotted their lands . . . and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past.'" S. Ex. Doc. No. 27, 53d Cong., 2d Sess., 19 (1894), quoted at *Yankton Sioux Tribe*, 522 U.S. 353. In sum, allotment and cession worked in tandem to completely eliminate the tribe's "land in common" – a "critical component of reservation status." *Yankton Sioux Tribe*, 522 U.S. at 345. *See also Gaffey II*, Pet. App. 229-30.

Both the Tribe and the United States focus on the subsidiary language of the 1894 Act in an attempt to denigrate its operative "cession and sum certain" language. *Yankton Sioux Tribe*, 522 U.S. at 333.

See, e.g., U.S. BIO 7, 15-16; Tribe BIO 5, 13-14. The actual text and meaning of the subsidiary provisions, however, reveal that they too support disestablishment. For example, Article V provides potential funding for "courts of justice and other local institutions." Pet. App. 340-41. The Article provides support for "local," i.e., city, county and state, courts and institutions, not "tribal" courts and institutions, and thus surely does not support continued reservation status. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 697 n.16 (1993).

Nor does the temporary withholding from sale to settlers of roughly 1,000 ceded acres for agency, school and other purposes as provided by Article VIII of the 1894 Act, Pet. App. 342-43, signal the continual existence of a "reservation." This Court did note that the language "counsel[ed]" for that result, *Yankton Sioux Tribe*, 522 U.S. at 350, but nonetheless found that the Act removed the boundaries and at least diminished the reservation. A more complete record, moreover, reveals that retention of such areas was "common, even for a terminated reservation." *Bruguier*, Pet. App. 187. For example, such lands were also reserved at the disestablished Lake Traverse Reservation. *DeCoteau*, 420 U.S. at 435, n.16, 438 n.19. *See also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 622 (1977) (Marshall, J. dissenting) (reservation of land allowed for "Indian schools, religious missions and service agencies" in disestablished areas); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from

reservation); 36 Stat. 440 (1910) (allowing Secretary to reserve lands for "agency, school, and religious purposes" in area of Pine Ridge Reservation held disestablished in *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975)).

The liquor provision, Article XVII, Pet. App. 347, likewise does not support reservation status. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47, found that a similar provision supported disestablishment of the area in question. The same should be true here.

Finally, the United States and the Tribe attempt to distinguish the negotiating history of the Lake Traverse disestablishment from that at Yankton by focusing on a press report quoted at *DeCoteau*, 420 U.S. at 433. U.S. BIO 22; Tribe BIO 18. This focus ignores the equally or more potent letter indicating disestablishment of 100 Yankton chiefs and tribal members in which they concurred with the Commissioner's understanding that "cession of the surplus lands dissolved governance of the 1858 reservation," *Yankton Sioux Tribe*, 522 U.S. at 353, quoting S. Ex. Doc. 27, 19, and they wanted "'the laws of the United States and the State to be recognized and observed.'" *Yankton Sioux Tribe*, 522 U.S. at 353, quoting S. Misc. Doc. 134, 53d Cong., 2d Sess., 1 (1894).

C. The conflict in holdings between the State and Federal courts makes a significant difference.

Belying their 16 years of advocacy, both the United States and the Tribe argue that it does not matter whether the Yankton Sioux Reservation has been disestablished. U.S. BIO 24-30; Tribe BIO 26-27. They latch onto the State's acknowledgment that the 30,000 acres of allotted lands within the former reservation boundaries are "Indian country" under 18 U.S C. § 1151(c), as "allotments, the Indian titles to which have not been extinguished." Because all agree that the allotments are "Indian country," the argument goes, there is no real dispute as to that land. The United States and the Tribe are wrong for two reasons.

First, as the Tribe acknowledges, the critical difference between "reservation" land and "allotted" land is *permanence*:

> The practical difference between Indian country under § 1151(a) and § 1151(c) is that Indian country within the former remains part of the reservation even when sold to non-Indians, whereas Indian country under the latter loses its Indian country status upon any sale to a non-Indian going forward.

Tribe BIO at 26.

Podhradsky IV also recognized this distinction, finding that the "outstanding allotments" qualified as "reservation" under 18 U.S.C. § 1151(a), Pet. App. 50-51, such that, after 1948, allotments would retain

"reservation" status after the trust patent was "terminated" and the land was conveyed "in fee simple" to non-Indians. *Id.* at 28. The United States nonetheless insists that the matter is unimportant because relatively few parcels of land have recently passed out of allotted status, so the permanence of allotted lands is not a problem. U.S. BIO 25. But 5,900 acres have left that status since the pivotal date of 1948. Moreover, the United States cannot guarantee that there will be no further shifts in federal Indian policy, or that individual members of the Tribe will uniformly decline to sell their property. The Tribe and tribal members may reasonably perceive that retaining land in trust significantly sacrifices marketability and productivity, and therefore decide to convert their land to fee status. *See, e.g* , Terry Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians* (1995) at 127 ("per-acre value of agricultural output was found to be 85 to 90 percent lower on tribal trust land than on fee simple land and 30 to 40 percent lower on individual trust land than on fee simple land"). In a recent year, over 260,000 acres were removed from trust status nationally. 2007 Ex. 130 at 9, n.8. There is no reason to believe that similar sales of allotted or other trust lands will not take place in this area.

Second, the status of the 5,900 acres which have left allotted status since 1948 and which are now owned by non-Indians has been placed in dispute. Under the South Dakota Supreme Court's decision in *Bruguier*, those 5,900 acres are definitively *not* part

of a reservation and are *not* Indian country because the reservation has been disestablished. Under the Eighth Circuit's decision, by contrast, the status of those 5,900 acres is now up in the air. Even after the court amended its opinion to delete the footnote declaring those lands to be reservation, its opinion leaves open that later it will so hold. *See Podhradsky IV*, Pet. App. 26-28, 50-51. As a consequence, if this Court declines to grant review, the jurisdictional status of that land will be an open question and years of litigation will inevitably follow – even though South Dakota has been litigating for 16 years to resolve definitively that the reservation is no more.

The United States also insists that the status of the 5,900 acres is not before the Court because their status was not actually "'litigated.'" U.S. BIO 30. *See also* Tribe BIO 29. This claim ignores the State's consistent legal position, spanning 16 years, that the entire reservation has been "disestablished." *See, e.g.*, Answer of State of South Dakota, Civ. No. 94-4217, Joint Appendix, S.Ct. No. 96-1581 at 86; *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996) (South Dakota's "core argument is that the 1894 Act eliminated the reservation"); Answer and Counterclaim of Defendants Governor William Janklow and Attorney General Mark Barnett, Civ. 98-4042, Doc. 31 (prayer for "judgment declaring that all lands within the 1858 boundaries . . . have lost 'Indian country' and 'reservation' status pursuant to 18 U.S.C. § 1151(a))"; *Podhradsky IV*, Pet. App. 19 (South Dakota and other

parties "continue to argue" that "reservation has been completely disestablished"). Precisely what more South Dakota could have done to "litigate" the issue is not clear.

The jurisdictional cloud covering those 5,900 acres is severe. If the South Dakota Supreme Court is correct, the parcels are not Indian country, and are therefore subject entirely to state and local control. If the Eighth Circuit decision is left unreviewed, the Tribe, the United States, the parcels' owners, or any person can claim that the lands are "reservation." The lands are therefore subject to dispute as to whether federal or tribal jurisdiction, rather than state and local jurisdiction, applies to any crime by or against an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Similarly, state and local civil jurisdiction over activities on such lands will be called into question, for the State loses substantial civil jurisdiction in Indian country. *See Williams v. Lee*, 358 U.S. 217 (1959). The State's ability to impose taxes would also be subject to challenge. *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973). The Eighth Circuit ruling will inevitably produce protracted litigation in the state, tribal and federal courts with regard to both criminal and civil matters. *See also Amicus Curiae* Brief for Colin Soukup, et al., Nos. 10-929/10-931/10-932; *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, Nos. 10-929/10-931/10-932; Brief of Randall Community Water District, *Amicus Curiae*, in Support of

Petitions for Writ of Certiorari, Nos. 10-929/10-931/10-932 (all detailing practical concerns of Amici). This Court's review is amply warranted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Charles.McGuigan@state.sd.us

Counsel for Petitioners
Dennis Daugaard,
Governor of South Dakota,
and Marty J. Jackley,
Attorney General of South Dakota

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In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF CHARLES MIX ELECTRIC ASSOCIATION, INC. AND ROSEBUD ELECTRIC COOPERATIVE, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

MICHAEL J. WHALEN
MICHAEL J. WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae
Charles Mix Electric Association, Inc. and
Rosebud Electric Cooperative, Inc.

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Pursuant to Supreme Court Rule 37(2), Charles Mix Electric Association, Inc. of Lake Andes, South Dakota, and Rosebud Electric Cooperative, Inc. of Gregory, South Dakota, hereby respectfully submit this brief as *amici curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICI* COOPERATIVES[1]

Charles Mix Electric Association, Inc. ("Charles Mix Electric" herein) and Rosebud Electric Cooperative, Inc., ("Rosebud Electric" herein) are both nonprofit rural electric distribution cooperatives incorporated in 1945 under South Dakota Law. Charles Mix Electric serves rural Charles Mix County. Rosebud Electric serves rural Gregory and Tripp Counties. The original (1858) Yankton Sioux Indian Reservation was located in what is now Charles Mix County, South Dakota. The original (1889) Rosebud Indian Reservation included what is now Gregory, Tripp, Lyman, Mellette and Todd Counties, South Dakota. These diminished reservations share a common history,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

especially with regards to treaty and statutory language, Indian allotments, ceded surplus lands, and subsequent white settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

By South Dakota statute, each of these cooperatives serves an assigned territory. S.D.C.L. § 49-34A-42. Charles Mix Electric's service territory includes approximately 36,500 acres of "Indian country" on the east side of the Missouri River. Rosebud Electric's service territory includes approximately 88,000 acres of "Indian country" on the west side of the Missouri River. The Indian lands served by these two cooperatives are scattered in "checkerboard" fashion throughout their respective service territories. In the past several years the Yankton Sioux Tribe and the Rosebud Sioux Tribe have each sought to exercise regulatory authority over businesses located within the former (1858 and 1889) reservation boundaries. These efforts included business licensure, taxation, rate regulation, imposition of a tribal utility code, and establishment of a tribal utility commission.[2]

The *amici* cooperatives are currently regulated by both state and federal law which prohibit rate

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[2] See Appendices A and B, Title 11 and 20 of the "Law and Order Code of the Rosebud Sioux Tribe". See also Appendix C, May 27, 2009 correspondence to Rosebud Electric Cooperative, Inc., from Rosebud Sioux Tribe Utility Commission Office.

discrimination within the same class of consumers. Under controlling law, the same rates must apply to tribal members and nonmembers regardless of location of service, i.e. fee, tribal, or trust lands. Cooperative law also requires that each class of consumers bears the operating costs and expenses required to furnish service to that class. *Lillethun v. Tri-County Elec. Cooperative, Inc.*, 152 N.W.2d 147 (N.D. 1967). Under the terms of United States Department of Agriculture guaranteed Rural Utility Service ("RUS") loans and federal regulations, distribution cooperatives are required to design and implement rates to provide sufficient revenue to:

(i) pay all fixed and variable expenses;

(ii) provide and maintain reasonable working capital; and

(iii) maintain, on an annual basis, minimum "coverage ratios" (TIER, DSC, OTIER, and ODSC) to ensure "reasonable security for and/or the repayment of loans made or guaranteed by RUS."[3]

See 7 C.F.R. § 1710.114. Failure to meet such requirements may result in default, acceleration of the debt, and operational "take-over" by RUS.[4]

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[3] RUS Standard Loan Contract, Article I, § 5.4.

[4] RUS Standard Loan Contract, Article VII, § 7.1 and Article VIII, § 8.1.

The decision of the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), would arguably subject the *amici* rural electric cooperatives to utility regulation (including rate making) by the resident tribes; at least to the extent of the scattered tribal and trust lands. This is so because the Court in *Podhradsky* expressly held that Indian allotments and trust lands within a diminished Indian reservation retain their reservation status and constitute "Indian country" under 18 U.S.C. § 1151(a), and therefore fall under "the primary civil, criminal, and *regulatory* jurisdiction of the federal government and the resident Tribe rather than the states." *Id.* at 1006 (emphasis added).

For these *amici* cooperatives (and those similarly situated), the consequences of tribal regulation would be disastrous because tribal rates, rules, and procedures differ from those governing the other 85% to 90% of the consumers within the same service territory. The cooperatives would invariably find themselves at odds with one authority or another for discriminatory or disparate treatment within the same class of consumers. Although Tribal Utility Codes may defer to federal regulations and RUS loan provisions, there is no assurance that rates established by the Tribal Utility Commissions would be sufficient to meet the minimum standards required by RUS loans and federal regulations. Thus, these non-profit cooperatives could face default and foreclosure.

This intolerable situation is not confined to the *amici* cooperatives. In the past few years, the national trend toward tribal regulation of utilities has grown dramatically. In South Dakota alone, four Tribes have established tribal utility codes, taxes, and commissions.[5] Other Tribes have sought to impose gross revenue, sales, and/or business taxes upon electric distribution cooperatives for the privilege of doing business in diminished reservations.[6] Of the 28 rural electric distribution cooperatives in South Dakota, 14 serve tribal and trust lands within their respective service territories.[7]

The practical effect of the Eighth Circuit Court's holding in the *Podhradsky* case is to create innumerable "mini-reservations" within electric service territories where tribal utility commissions may impose rates and rules without regard to 85% to 90% of the other consumers within the same area and classification. For Charles Mix Electric and Rosebud Electric the situation is unmanageable.

ARGUMENT

I. HISTORICAL SUMMARY

The "tangled history" of the Yankton Sioux Reservation has been set forth in numerous federal and

[5] Crow Creek Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, and Standing Rock Sioux Tribe.

[6] Sisseton-Wahpeton Sioux Tribe and Yankton Sioux Tribe.

[7] See Appendices D and E.

state decisions. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Perrin v. United* States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1999); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980); *Bruguier v. Class*, 1999 S.D. 122, 599 N.W.2d 364; *State v. Greger*, 1997 S.D. 14, 559 N.W.2d 854; *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95 (1964); *State ex rel. Hollow Horn Bear v. Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959).

A brief summary of that history is as follows: The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. The reservation originally consisted of 430,495 acres in what is now Charles Mix County, South Dakota. With the passage of the General Allotment (Dawes) Act of 1887, the Yankton Sioux Reservation was partitioned into parcels ("allotments") assigned to individual tribal members. In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894 (the "1894 Act"). By this agreement and for a

"sum certain" ($600,000), the Tribe "ceded, sold, relinquished, and conveyed" all of its unallotted or "surplus" land (168,000 acres) to the United States. President Cleveland opened the unallotted land for settlement in 1895 and the area filled with white settlers. Tribal government quickly faded and became nonexistent. By 1913, Yankton Sioux tribal members held 70,000 acres. By 1930, tribal members owned only 43,358 acres. Of the 262,000 acres originally allotted, only about 15% remained in Indian hands. At present, total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,500 acres of tribal land. Most of these remaining Indian lands are held in trust by the United States government for the benefit of individual tribal members and the Tribe itself. The process of "diminishment" of the Yankton Sioux Reservation is fully documented in both *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333-40, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *State v. Greger*, 559 N.W.2d 854, 856-59 (S.D. 1997).

II. CONFLICT WITH STATE SUPREME COURT

The holding of the Eighth Circuit Court in *Podhradsky* directly conflicts with the South Dakota Supreme Court's decisions regarding the former Yankton Sioux Reservation. The South Dakota Supreme Court held in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997) that:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unalloted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the [United States] Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished.

Id. at 867.

A few years later and mindful of the United States Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the South Dakota Supreme Court handed down its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). There, the State Supreme Court, using the traditional three factor analytical structure, held that the Yankton Sioux Reservation had been *disestablished* by the 1894 Act and that formerly allotted land did not qualify as "Indian

country" under 18 U.S.C. § 1151(a). *Id.* at 371-78. Further, in construing Section 1151 the State Supreme Court stated, " . . . Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory." *Id.* at 371; citing *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959).

However, the Eighth Circuit Court in *Podhradsky* pointedly disregarded *Greger* and *Bruguier* and ruled that the Yankton Sioux Reservation "was never disestablished" and that allotments are part of the "continuing" Yankton Sioux Reservation and therefore qualify as "Indian country" under 18 U.S.C. § 1151(a). *Podhradsky*, 1010. Going further, the Court held that allotments still held in trust are land within the limits of an Indian reservation under the jurisdiction of the United States Government. *Id.*

Central to the Eighth Circuit Court's analysis was its determination that, "In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those [allotted] lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a)." *Podhradsky*, 1017. Yet in *Bruguier*, the South Dakota Supreme Court concluded that the Congressional intent behind the language of the 1894 Act was "unmistakable" and that Congress intended to terminate the reservation. *Bruguier*, 377.

The obvious conflict between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals

cannot be reconciled. In *Podhradsky* the federal appellate court dismissively commented that, "*Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue. . . ." *Podhradsky*, at 1005 n. 7. Such a perfunctory dismissal of Justice Konenkamp's careful scholarship in *Greger* and *Bruguier* tends to underscore the need to resolve the persistent conflict between South Dakota's highest court and the Eighth Circuit Court of Appeals.

III. *MONTANA v. U.S.*

The distinction between "1151(a) Indian country" and "1151(c) Indian country" is all important to the *amici* cooperatives because whether the lands in question are "within a reservation" is determinative of tribal civil and regulatory jurisdiction over non-Indian activities. *See Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); and *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). It is settled law that tribes generally do not possess authority over non-Indians who come within their borders. *Montana*, 450 U.S. 544, 564-65 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). This is so because nonmembers have no part in tribal government and have no say in the laws and regulations that govern tribal territory. *Plains Commerce*

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 371, 128 S.Ct. 2709, 2724, 171 L.Ed.2d 457, 477 (2008). However, *Montana* provides two exceptions: (1) a tribe may regulate, through taxation, licensing, and other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Plains Commerce Bank*, 329-30, citing *Montana*, at 565.

Both *Montana* exceptions require that the activities of the nonmember occur on the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). ("The operative phrase is 'on their reservations'.") Neither *Montana* nor its progeny purports to allow Indian Tribes to exercise civil or regulatory jurisdiction over the activities or conduct of non-Indians occurring outside their reservations. *Id.* at 1091. Thus, for the *amici* cooperatives, the critical question is whether the trust allotments in the diminished Yankton Sioux Reservation are "within a reservation" under subsection (a) of 18 U.S.C. § 1151.

IV. "WITHIN A RESERVATION" vs. "RESERVATION STATUS"

The Court in *Podhradsky* departs from the plain meaning of 18 U.S.C. § 1151 in its determination that allotments retain their "reservation status" despite the removal of exterior reservation boundaries. It does so by straying from the literal and logical meaning of the words of the statute in favor of an attenuated theory of residual "reservation status".

18 U.S.C. § 1151 provides:

> [T]he term "Indian country", as used in this chapter, means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 was originally enacted to define federal *criminal* jurisdiction. Only by judicial fiat has

it come to have implications for tribal taxation and civil/regulatory jurisdiction. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) citing *DeCoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425, 427, n. 2 (1975). In analyzing 18 U.S.C. § 1151, the South Dakota Supreme Court in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, interpreted the statute to mean that subsection (a) encompassed those areas *within a reservation,* and that subsection (c) applies to those lands standing *outside the reservation boundaries*. *Bruguier*, 371. This common sense interpretation was made with due regard for and careful consideration of the United States Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *See Bruguier v. Class*, 599 N.W.2d 364, 365 (S.D. 1999). For the South Dakota Supreme Court, the term "within the limits of any Indian reservation" meant exactly that – land within the delineated boundaries of a geographically identifiable reservation.

By contrast, the Eighth Circuit Court in *Podhradsky* couched much of its decision in terms of "reservation status". *Podhradsky*, 1008-10. In using "reservation status" rather than "within the limits of any reservation", the Eighth Circuit panel granted itself an interpretive license to disregard the fact that the boundaries of the former Yankton Sioux Reservation have unquestionably been "obliterated". *See, e.g., United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206,

63 S.Ct. 534, 87 L.Ed. 716 (1943). The Court of Appeals justified its departure from the plain meaning of 18 U.S.C. § 1151(a) by referencing *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), wherein the Court stated that, "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". *Solem*, at 470, citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909). The defect in the *Podhradsky* Court's "reservation status" analysis is that in *Solem* the Supreme Court was not dealing with a *diminished* reservation. As the Court expressly found in *Solem*, "The Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." *Solem,* 465 U.S. 463, 476. The Court in *Podhradsky* carelessly borrowed the term "reservation status" from a case factually distinguishable from the instant case.

Moreover, the Eighth Circuit Court engaged in considerable legal wrenching to fit the "square peg" of trust allotments in the "round hole" of section 1151(a). It began with the correct assertion that allotted trust lands were "Indian country" under § 1151(c). From there, however, the Court in *Podhradsky* set a strident course to scale the "almost insurmountable presumption of diminishment" arising from the statutory language and historical context of the 1892 Agreement and 1894 Act.

Instead of giving due weight to the overwhelming evidence of diminishment, the Eighth Circuit Court turned a blind eye to such evidence and pursued its philosophically preferred conclusion that a continuing reservation existed. In particular, the Court in *Podhradsky* found that:

(A) "The simple act of dividing the reservation was insufficient to divest the allotted lands of reservation status". *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1008 (8th Cir. 2010).

(B) "The Tribe's willingness to cede to the United States its unallotted land does not indicate that the reservation status of allotted lands was also revoked." *Id.*

(C) "We have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.*

(D) "Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement." *Id.* at 1009.

(E) "In the absence of such an intention, we must conclude that at the time of the [1894] Act those [allotted] lands retained the same reservation status they had enjoyed since the original 1858 Treaty." *Id.*

However, those findings ignored one simple fact: the reservation boundaries were removed under the plain language of the 1892 Agreement and 1894 Act. As pointed out by Justice Konenkamp in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, "[T]he boundaries created by the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate *any* boundary. . . ." *Id.* at 371 (emphasis added). The United States Supreme Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587-88, 65 L.Ed.2d 665 (1980). That geographical component has generally been ignored in *Podhradsky.*

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court determined that:

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unalloted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See *DeCoteau, 420 U.S., at 445.* Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a

provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra, at 470*; see also *Hagen, supra, at 411.*

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra, at 445*, and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See *510 U.S., at 412.*

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962)*, and *Mattz v. Arnett, 412 U.S. 481, 501-502 (1973)*, we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus

> lands belonging to the Cheyenne River Sioux as language of cession. See *465 U.S., at 472*. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

Id. at 344-45.

At most, the United States Supreme Court envisioned a severely diminished reservation; although it stopped short of deciding whether the reservation was fully "disestablished". ("We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* at 358.) Nonetheless, such judicial restraint should not be mistaken for a license to create reservation boundaries where Congress specifically removed them a century ago.

Despite the Eighth Circuit Court's reliance on "reservation status" in *Podhradsky*, scant authority exists to support the theory that § 1151(a) applies where no reservation boundaries exist. Rather, the controlling case law consistently holds that Indian allotments outside reservation boundaries derive their "Indian country" status from their allotment character, not from residual "reservation status". *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914). For § 1151(a) to apply, there must be identifiable reservation boundaries. *See*

United States v. Celestine, 215 U.S. 278, 285-86, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Mattz v. Arnett*, 412 U.S. 481, 506, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Thus, the Eighth Circuit Court's "reservation status" approach is inapposite here where the boundaries have been removed by treaty and statute.

The Court's theory of "reservation status" without reservation boundaries, then, is akin to asserting that a shadow remains after the object casting the shadow has been removed. Justice Konenkamp of the South Dakota Supreme Court offers a less ethereal jurisdictional theory for 18 U.S.C. § 1151:

> If subsection (a) is to receive a literal interpretation, a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title could not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservation, and (c) to apply to allotted lands in open territory. *Hollow Horn Bear*, 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the

> Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier v. Class, 599 N.W.2d 364, 371 (S.D. 1999).

Essentially, Justice Konenkamp finds there is no § 1151(a) "Indian country" within the former Yankton Sioux Reservation. His approach does no harm to federal and tribal criminal jurisdiction on allotted trust lands and agency property because such lands and property still qualify as "Indian country" under subsections 1151(b) and (c). Yet, the fee owners of former allotments and businesses providing goods and services to current trust lands are not subject to the civil or regulatory authority of the Yankton Sioux Tribe because such lands are not "within a reservation" as required by *Montana*.

In summary, the Eighth Circuit Court in *Podhradsky* contrived a jurisdictional theory which put reservation boundaries around each parcel of allotted trust land in order to render it more "durable" § 1151(a) "Indian country". *Podhradsky*, 1008. However, this theory problematically assigns "reservation status" to allotted lands which have not been "within the limits of any reservation" for more than 100 years. Absent any actual reservation boundaries, the Eighth Circuit Court in *Podhradsky* effectively created "mini-reservations" out of the hundreds of parcels of allotted lands scattered throughout Charles Mix County. By doing so, the Court usurped the sole and exclusive power of Congress to create Indian reservations. *Sioux Tribe of Indians v. United*

States, 316 U.S. 317, 326, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942).

IV. THE AGENCY LAND

As discussed above, the Eighth Circuit Court in *Podhradsky* disregarded much of the United States Supreme Court's structural analysis in *South Dakota v. Yankton Sioux Tribe* in order to rule that the allotted lands retained their "reservation status". Moreover, the Eighth Circuit Court "cherry-picked" those few discrepant sentences within *South Dakota v. Yankton Sioux Tribe* which it felt supported its novel theory of a continuing reservation without boundaries. Specifically, the Eighth Circuit Court spotlighted the Supreme Court's statement that Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" and quoted *Solem v. Bartlett*, 465 U.S. 463, 474, stating that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Podhradsky*, 1005.

However, in *Bruguier v. Class*, Justice Konenkamp specifically addressed the "agency, school, and other purposes" language of Article VIII of the 1894 Act. First, he noted that the land was originally reserved to the United States Government, not the Tribe. *Bruguier*, 599 N.W.2d 373 n. 15 (S.D. 1999). (The Tribe did not acquire the school and agency land until

February 13, 1929, when the Government returned it to the Tribe by Public Law No. 70-729, 45 Stat 1167.) Second, Justice Konenkamp explained:

> In keeping with the Dawes Act's twenty-five year trust period following the allotment process, setting aside government land for school and agency purposes was common, even for a terminated reservation. n. 16. In the 1891 treaty with the Sisseton-Wahpeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau*, 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school buildings are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v Kneip*, 430 US 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977) (Marshall, J., dissenting).

Bruguier v. Class, 599 N.W.2d 364, 374 (S.D. 1999).

Thus, the "agency, school, and other purposes" language of the 1894 Act is not dispositive of whether Congress intended a continuing reservation. Moreover, such equivocal language does not countermand

the historical context, statutory and treaty language, expressed congressional intent, jurisdictional history, subsequent treatment, or contemporary demographics of the area; all of which point to a disestablished reservation.

VI. *BEARDSLEE v. U.S.*

The Eighth Circuit Court has previously interpreted 18 U.S.C. § 1151 subsection (a) and (c) to arrive at a construction of the statute markedly different than the Court's decision in *Podhradsky*. In *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), the defendant, an enrolled member of the Rosebud Sioux Tribe, killed his mother and half-brother on formerly allotted land situated in the town of Mission, South Dakota. Mission is located within the boundaries of the diminished Rosebud Indian Reservation and was therefore considered 1151(a) "Indian country" by the United States. The murder occurred at a house rented by the defendant's mother, but owned in fee by non-Indians. At trial, the defendant challenged jurisdiction on the basis that the site of the crime was formerly allotted land and had lost its "Indian country" status by reason of a 1912 patent to non-Indians. In *Beardslee*, the Eighth Circuit Court squarely addressed the substantive differences between "Indian country" under 18 U.S.C. §§ 1151(a) and 1151(c):

> The definition of clause (a) of § 1151 would seem clearly to include the town of Mission, and the site of the alleged offenses, for it is "within the limits" of the Rosebud

> Reservation "notwithstanding the issuance of" the 1912 patent. The defense, however, pivots its jurisdictional argument on clause (c), which would include, within the definition of Indian country, "all Indian allotments, the Indian titles to which have not been extinguished". It is then urged that, by inference, an Indian title which has been extinguished is outside the definition. We decide this issue against the defense. . . . We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See *State ex rel. Hollow Horn Bear v. Jameson, supra*, pp.184-185 of 95 N.W.2d.

Beardslee v. United States, 387 F.2d 280, 285-87 (8th Cir. 1967).

Clearly, the *Beardslee* Court understood that § 1151(a)'s phrase "within the limits of any reservation" meant lands located within the geographically identifiable parameters of a reservation, whether fee or allotted land. Likewise, the Court in *Beardslee* recognized that allotted lands outside reservation boundaries fell within the purview of § 1151(c). Thus, the reference in *Beardslee* to allotted lands outside the bounds of a reservation as "*non-reservation land*"

is particularly instructive. If allotted trust land is not within reservation boundaries, it is § 1151(c) "Indian country" and not § 1151(a) "Indian country". Plainly, the *Podhradsky* Court's efforts to contort § 1151(c) allotments into § 1151(a) reservation land contravenes the plain meaning of the statute as well as existing case law.

CONCLUSION

The *amici* rural electric cooperatives are rightfully concerned that the Eighth Circuit Court's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), has brought them to the brink of a regulatory disaster. Discriminatory utility regulation by differing Tribal Utility Commissions, each with the power to set rates and impose taxes, threatens the ability of these electric distribution cooperatives to provide service and power to its customers, including tribal members and entities. "Checkerboard" utility regulation within diminished Indian reservations not only violates basic principles of cooperative law, but also engenders never-ending litigation in tribal, state, and federal courts. This unmanageable situation is the result of the *Podhradsky* Court's misapprehension of established jurisdictional case law and disregard of the plain meaning of 18 U.S.C § 1151. Moreover, the decision in *Podhradsky* has the practical effect of putting reservation boundaries around innumerable allotments which have not been "within a reservation" for more than 100 years. Compelling reasons

exist for the Supreme Court to grant the Petitions for Writ of Certiorari, to-wit: the holding in *Podhradsky* conflicts with numerous decisions of the State Supreme Court and prior decisions of the Eighth Circuit Court of Appeals and the United States Supreme Court.

Dated this 10th day of February, 2011.

MICHAEL J. WHALEN
MICHAEL J. WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc.

APPENDIX A

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE ELEVEN – TRIBAL TAX CODE

Chapter 1 – Legislative Findings and Purpose
Chapter 2 – General Provisions
Chapter 3 – Tribal Tax Commission
Chapter 4 – Appeals
Chapter 5 – Enforcement
Chapter 6 – Penalties and Interest
Chapter 7 – Retail Sales and Service Tax
Chapter 8 – Use Tax
Chapter 9 – Cigarette Tax
Chapter 10 – Contractors Excise Tax
Chapter 11 – Land Use Tax
Chapter 12 – Business Licences

CHAPTER 1: LEGISLATIVE FINDINGS AND PURPOSE

Sec. 101 Sovereign Power to Tax – The power to levy taxes and similar exactions is an inherent and essential part of the authority of any government. This power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority. The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 948, as amended, and governed pursuant to a Constitution and By-Laws ratified on November 23, 1935, and approved by the Commissioner of Indian Affairs on

December 20, 1935, as amended from time to time thereafter. Pursuant to the Constitution and By-Laws, the Rosebud Sioux Tribe. This Code is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1(h) of the Tribal Constitution, which authorizes the Tribal Council to levy taxes upon members of the tribe and to levy taxes or license fees upon non-members doing business within the Reservation.

Sec. 102 Benefits of Tribal Government – Among the benefits provided by the tribal government to tribal members and to non-members residing or conducting business within the Rosebud Reservation are the following: the provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction; the promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and the protection of Reservation lands and resources.

. . . .

Sec. 713 Tax on Utility Services – There is hereby imposed a tax of 4% upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this Chapter; when sold at retail within the Reservation to consumers or users.

. . . .

APPENDIX B

Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

TITLE 20 – UTILITIES

Chapter 1 – Legislative Findings, Purpose and Scope
Chapter 2 – General Provisions
Chapter 3 – Tribal Utility Commission
Chapter 4 – Powers and Duties of Commission
Chapter 5 – Duties of Public Utilities
Chapter 6 – Electric Utilities
Chapter 7 – Electric Utility Rates and Tariffs
Chapter 8 – *Telecommunications Companies (Reserved)*
Chapter 9 – Pipeline Utilities (Reserved)
Chapter 10 – Gas Utilities (Reserved)
Chapter 11 – Water Companies (Reserved)
Chapter 12 – Heating Utilities (Reserved)
Chapter 13 – Other Public Utilities (Reserved)
Chapter 14 – Procedure on Regulation
Chapter 15 – Civil Infractions

CHAPTER ONE

LEGISLATIVE FINDINGS, PURPOSE AND SCOPE

§20-1-101. Legislative Findings.

(1) **Sovereign Power to Regulate Utilities.** The power to regulate utilities is an inherent and essential part of the authority of any reservation tribal government. This power is therefore an aspect of the retained sovereignty of the Rosebud Sioux Tribe except

where it has been limited or withdrawn by federal law. The Rosebud Sioux Tribe is a sovereign Indian tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 984, as amended, and governed pursuant to a Constitution and Bylaws ratified on November 23, 1935, and approved by the Secretary of the Interior, Harold L. Ickes, on December 16, 1935, as amended from time to time thereafter.

Pursuant to the Constitution and Bylaws, as amended, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. This Title is enacted pursuant to the inherent sovereign tribal powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), (t) and (u) of the Tribal Constitution, which authorize the Tribal Council to represent the Tribe and to negotiate with federal, state and local governments and with private persons, to purchase and otherwise acquire lands and other property for or on behalf of the Tribe and manage, permit, assign, lease, sell, exchange, encumber or otherwise deal with tribal lands and other property as authorized by law, to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in tribal lands or other tribal assets without the consent of the Tribe, to manage all economic affairs and enterprises of the Tribe, to levy taxes and license fees upon non-members doing business within the Reservation, to regulate and license all business and professional activities

conducted upon the Reservation, to exclude by ordinance from the restricted lands of the Reservation persons not legally entitled to reside therein, to enact ordinances providing for the maintenance of law and order and the administration of justice by establishing a tribal court system, to safeguard and promote the peace, safety, morals, and general welfare of the Tribe by regulating the conduct of trade and the use and disposition of property on the Reservation, to charter subordinate organizations for economic purposes, to enact resolution regulating the procedures of all the Tribal Council, all tribal agencies and tribal officials, to administer any funds within the control of the Tribe, and to delegate to subordinate boards or tribal officials any or all of the foregoing powers, subject to review by the Tribal Council.

(2) **Need For Adequate Utility Regulations.** As both the Indian and non-Indian populations within the boundaries of the Reservation increase, and as additional residential, commercial, governmental and agricultural activities multiply, the need for adequate utility regulations grows ever more serious. Inasmuch as the Reservation is checkerboarded with both trust land and nontrust land, and inasmuch as both trust land and nontrust land are crisscrossed by utility lines, pipelines, rail lines and rights-of-way of both investor-owned and nonprofit utilities, adequate protection of utilities, the Tribe, tribal members and nonmembers

requires that the Tribe regulate all utilities operating within the Reservation.

(3) **Demonstrably Serious Impact of Utility Activities Upon the Economic Security, Health and Welfare of the Tribe and Tribal Members.** The rural nature of the Reservation, the fact that many homes of tribal members, especially HUD financed homes, are "all electric," that is, heated solely by electricity, the lack of any other practical heat source for many tribal members and nonmembers, the fact that the health and very lives of many tribal members and nonmembers are dependent upon an assured flow of electricity during the harsh, subzero winter months, the lack of practical transportation of many elderly tribal members and nonmembers during the harsh, subzero winter months, the fact that tribal economic enterprises furnish the majority of jobs for both tribal members and nonmembers on the Reservation, the high cost of electricity within the Reservation, the urgency of minimizing the cost of electricity to the Tribe, tribal members and nonmembers and to economic enterprises owned by the Tribe and tribal members, all evidence the demonstrably serious impact of utility activities upon the economic security, health and welfare of the Tribe and tribal members.

(4) **Lack of State Jurisdiction.** The State of South Dakota lacks jurisdiction to regulate utilities within the Reservation for the

reason that state regulation of such utilities interferes with the right of the Tribe and tribal members to make their own laws and be ruled by them and for the additional reason that utility regulation is preempted by the Tribe and the federal government with respect to all HUD homes of tribal members, other homes and businesses of tribal members financed in whole or in part by the Tribe or the federal government, all tribal buildings and businesses of the Tribe financed in whole or in part by the Tribe or the federal government and all Bureau of Indian Affairs or other federally owned or operated buildings.

(5) **Unconstitutionality of State Utility Regulation Within the Reservation.** As applied, the statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission regulating utilities within the Reservation unconstitutionally deny utilities, the Tribe, tribal members and non-members equal protection under both state and federal law because they (a) exempt from regulation of the State Public Service Commission the rates, contracts, sufficiency of facilities, or rules and regulations, [of] any rural electric cooperative corporation or association or any utility owned and operated by the State or by any city, county, township or other political subdivision of the State, (b) assign service areas to each utility, including rural electric cooperative corporations or

associations, within which such utility is granted the exclusive right to provide service at retail price at each and every location at which it was servicing a customer as of March 21, 1975 and to every present and future customer within such area, (c) prohibit any utility, including rural electric cooperative corporations or associations, from providing service at retail price within the assigned service area of another utility unless such other utility consents in writing, but (d) do not grant similar rights, protections or exemptions to any utility owned and operated by any federally recognized Indian tribe or political subdivision thereof within the limits of its reservation.

(6) **Failure of State Law to Regulate Utilities Not Operated for Profit Within the Reservation.** Statutes of the State of South Dakota purporting to regulate utilities operating within the Reservation and purporting to grant jurisdiction to the State Public Service Commission are altogether inadequate in protecting either the Tribe, tribal members, nonmembers or any such utility because such statutes exempt from state regulation the rates, contracts, or sufficiency of facilities, or rules and regulations of any utility that is not operated for profit, and yet purport to authorize the State Public Service Commission to prevent extension of service to the Tribe, a tribal member or a tribal member's business on trust land, or to a tribal business on trust land, by any utility that is operated for profit or any rural

electric cooperative corporation or association that is not specifically assigned the specific portion of the Reservation in question as its exclusive service area. Such extension of service may be denied regardless of whether such service economically benefits the Tribe or tribal member or whether extension of such service will provide the Tribe or tribal member a more secure source of service. Such application of state law results in almost no state legal controls over whether any rural electric cooperative corporation or association operating within the Reservation charges excessive amounts for utility service, or discriminates against the Tribe or tribal members and nonmembers, and unconstitutionally deprives the Tribe, tribal members and nonmembers from choosing utility service from whichever utility is most economically beneficial and provides the most secure source of service.

(7) **Illegal Collection of State Taxes By Utilities.** Despite the fact that both tribal members and the Tribe are immune from state taxes for all utility services provided them within the Reservation, utilities operating within the Reservation have for many years illegally collected the state gross receipts tax and other state taxes upon utilities with respect to services provided to both tribal members and the Tribe within the Reservation. Such illegal collection of state tax cannot be expected to stop unless tribal regulation of such utilities prohibits it as a matter of tribal law.

(8) **Consensual Relations Between Utilities Operating Within the Reservation and the Tribe, Tribal Members and Nonmembers.** The Council finds that every utility which enters and operates within the Reservation, enters into consensual relations, commercial dealings and contracts with residents of the Reservation, Indian and non-Indian, and with the Tribe, to provide services, operate facilities, construct and erect pipelines, transmission lines, poles, towers and other improvements upon and across Reservation lands owned by Indians, non-Indians and the Tribe. The Council further finds that the services, rates, policies, procedures and practices of every utility located and operating upon the Reservation have a demonstrably serious impact which imperils the economic security, health, welfare and general well-being of the Tribe, its members, and all residents of the Reservation and that regulation of every such utility by the Tribe is a necessary and proper exercise of the sovereign authority of the Tribe. The Council further finds that regulation of such utilities located, operating or providing services upon the Reservation is an essential governmental function of the Tribe and that regulation of every such utility located, operating or providing services upon the Reservation by the State of South Dakota or any municipality or political subdivision of the State is an infringement upon the right of the Tribe to make its own laws and be governed by them and demonstrably imperils

the political integrity and right of self-government of the Tribe.

(9) **Utilities Have Easements Across Tribal Land.**

§20-1-102. Purpose.

The Council hereby declares it to be in the public interest that all utilities located, operating or providing services within the Reservation be regulated as hereinafter provided in order to provide all retail consumers of utility services and commodities within the Reservation with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of such utilities and their need to construct facilities to provide such services and commodities or otherwise to obtain utility supplies, to avoid unnecessary duplication of facilities which increase the costs of service to the consumer and to minimize disputes between utilities which may result in inconvenience or diminished efficiency in service to such consumers. The purpose of this legislation shall also be to regulate all utility policies located, operating or providing services within the Reservation with respect to matters other than rates, including connection of service, disconnection of service, reconnection, deposit and overdue payment charges and to prohibit discriminatory or unreasonable preferences or advantages to any consumer or group of consumers by providers of utility services.

The regulation of utilities within the Reservation by the Tribe pursuant to this Title shall be deemed exclusive and shall preempt all other regulatory authority with respect to all utilities located, operating or providing services within the Reservation.

§20-1-103. Benefits of Tribal Government.

Among the benefits provided by the tribal government to all utilities located, operating or providing services within the Reservation are the following:

(1) The provision of governmental services, including sewer and water systems, police and fire protection, and a Tribal Court system of general jurisdiction;

(2) The promotion and regulation of economic activities within the Tribe's sovereign jurisdiction; and

(3) the orderly development and protection of the Reservation lands, resources and communities.

§20-1-104. Territory, Persons and Property Affected.

To the extent not prohibited by federal law, this Title shall apply to the following:

(1) The Rosebud Sioux Reservation within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all

lands, islands, waters, roads, and bridges, or any interests therein, whether in trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, and such other lands, islands, waters or any interest therein thereafter added to the Reservation;

(2) All trust or restricted land of the Tribe or any enrolled member of the Tribe situate[d] within the historical boundaries of the Reservation established in Section Two of the Act of March 2, 1889, 25 Stat. 888, including all lands, islands, waters, roads, or any interests therein, including Tripp, Mellette, Gregory and Lyman Counties; and

(3) All persons and property within any geographical area referred to in Subsections (1) and (2) that are subject to the jurisdiction and governmental power of the Tribe.

(4) Final adjudication by a court of competent jurisdiction that this Title does not apply to land, persons or property in specific circumstances shall not affect its application to land, persons or property in any other circumstances.

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POWERS AND DUTIES OF COMMISSION

§204-101. Jurisdiction and Powers of Commission.

(1) **General Jurisdiction of the Commission Over Utilities.** The general jurisdiction of the Commission shall extend to and include:

(a) Telecommunications companies engaged in the furnishing of telecommunications services, including telegraph and telephone companies engaged in the transmission of messages or conversations by voice or electronic means;

(b) Pipeline utilities engaged in the transportation of gas, oil, coal, and water;

(c) Electric utilities engaged in the generation and distribution of light or power;

(d) Gas utilities engaged in the distribution of natural, synthetic or artificial gas;

(e) Water companies for the storage and distribution of water for domestic or other beneficial use;

(f) Heating utilities engaged in the distribution of heat; and

(g) All other utilities that operate, maintain or control any equipment or facilities within the Reservation.

Nothing in this Title shall prohibit the Commission from making any order affecting rates, contracts, services rendered, adequacy or sufficiency of facilities, of any utility owned and operated by any state or by any political subdivision of any state or any utility that is not operated for profit.

(2) **Powers of Commission With Reference to Utilities.** The Commission shall have power to:

(a) Investigate all methods and practices of utilities or other persons subject to the provisions of this Title.

(b) Require utilities or other persons to conform to the laws of the Tribe and to all rules, regulations, and orders of the Commission not contrary to law.

(c) Require copies of reports, rates, classifications, schedules, and time tables in effect and used by such utilities or other persons and all other information desired by the Commission relating to such investigations and requirements to be filed with the Commission.

(d) Compel obedience to its lawful orders by proceedings of mandamus

or injunction or other proper proceedings, in the name of the Tribe, in any court having jurisdiction of the parties or of the subject matter, including the Tribal Court.

(e) Hold hearings on good cause shown or on its motion, and to provide notice thereof prior to hearing. Such notice shall he reasonable in view of the nature, scope, and importance of the hearing. Whenever it shall appear to the satisfaction of the Commission that all of the interested parties have agreed concerning the matter at hand, the Commission may issue its order without a hearing.

(f) Require, in its discretion, proof that no unreasonable profit is made in the sale of materials to or services applied for any utility by any firm or corporation owned or controlled directly or indirectly by the utility or any affiliate, subsidiary, parent, associate or any corporation whose controlling stockholders are also controlling stockholders of the utility, before permitting the value of such materials or services to be included in valuations or cost of operations for rate-making purposes. If unreasonable profits have been made in any such transactions,

evaluations of such materials and services may reduced accordingly.

(g) Employ and fix the compensation of rate experts, engineers, and all other expert help and assistance for rate increase application hearings, investigations, and proceedings relating to utilities, subject to Subsections (2)(h) and (2)(j). The expense of any hearings, investigations, and proceedings, and the compensation and actual expenses of any employees of the Commission while engaged in any such hearing, investigation, or proceeding shall, upon appropriate order of the Commission, be paid by the utility being investigated or involved in such hearing or proceeding. A utility liable for such costs and expenditures shall receive appropriate notice and opportunity to demand a hearing before the Commission.

(h) Retain and use the services of only the tribal attorneys or other attorneys designated by the Council upon a contract approved by the Council and the Secretary of the Interior.

(i) Employ and use the services of only the tribal accountants or other accountants designated by the

Council upon a contract approved by the Council.

(j) Cooperate with and receive technical and financial assistance from the United States or any state for any purposes relating to federal energy laws that deal with energy conservation, coal conversion, rate reform, and utilities subject to the jurisdiction of the Commission. The Commission shall also have the authority to file any reports, hold hearings, and promulgate regulations for any such purposes.

(k) Promulgate and enforce rules and regulations consistent with this Title.

(l) Employ and consult with such advisors regarding its duties as it may deem necessary.

(m) Require by regulation the filing of any forms or reports necessary for implementation of this Title.

(n) Examine under oath either orally or in writing any agent, officer, or employee of any utility subject to regulation under this Title, or any other witness with respect to any enforcement action authorized by this Title.

(o) Delegate to an individual Commissioner, or to the Director or other members of the Commission staff or Tribal staff, such of its functions as may be necessary to administer this Title efficiently; provided that the Commission may not delegate its powers to promulgate rules and regulations, or to hear or rule upon any complaints filed with the Commission pursuant to this Title.

(p) Adopt by regulation a schedule of fees and charges for services rendered relating to transcripts and the furnishing or certifying of copies of proceedings, files, and records.

(q) Adopt rules and regulations in furtherance of the purposes of this Title pursuant to §20-4-110.

(r) Exercise all other authority delegated to it by law, or as may be reasonably necessary in the implementation of any provisions of this Title.

Except as provided in this Title, the Commission may exercise one or more of the above powers, [in] its discretion, and may, by appropriate rule or regulation, issued after notice and hearing, assume regulatory authority over one or more classes of utilities within the Reservation. Failure to exercise one or more powers delegated under this Title shall not be deemed a waiver or affect

the ability to exercise such powers in the future.

(3) **Duties of Commission.** The Commission is hereby vested with the powers, rights, functions, and jurisdiction to regulate, in accordance with the provisions of this Title, every utility as defined herein. The exercise of such powers, rights, functions, and jurisdiction is prescribed as a duty of the Commission.

(4) **Power of Commission to Establish Rates.** The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to he followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

(5) **Power of Commission to Regulate Services.** Whenever the Commission shall find, after hearing, that the rules, regulations, practices, equipment, appliances, facilities or

service of any utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced, or employed, and, after hearing, shall fix the same by its order, rule, or regulation. The Commission shall, pursuant to §20-4-110 and after hearing, prescribe rules and regulations for the performance of any service, or the furnishing of any commodity, of a character furnished or supplied by any utility. On demand and tender of rates, such utility shall furnish such commodity and render such service within the time and upon the conditions provided in such rules and regulations.

. . . .

---

§20-5-107. To Disconnect No Service During Cold Weather.

The Commission shall promulgate regulations setting our procedures for and limitations on a utility's disconnection of residential utility customers who are unable to pay for utility service during cold weather. Such regulations shall include the following:

(1) A definition of "cold weather" as being any time the temperature falls below -30 degrees Fahrenheit, including allowance for a wind chill factor.

(2) Coverage of any utility customer, whom the utility knows or has reason to know (i) whose household income is less than 185% of the federal poverty level; (ii) is bedridden or is otherwise suffering the effects of a serious, life-threatening disease, or (iii) for whom the disconnection of utility service would have other serious, life-threatening effects;

(3) A provision that a customer who pays the utility at least 10% of the customer's income or the full amount of the utility bill, whichever is less, in a cold weather month cannot be disconnected during that month; provided that for the purpose of this Subsection, the term "customer's income" means the actual monthly income of the customer except for a customer who is normally employed only on a seasonal basis and whose annual income is over 135% of the federal poverty level, in which case the customer's income shall be the average monthly income

of the customer computed on an annual calendar year basis.

(4) A provision that the 10% figure in Subsection (3) above must be prorated between energy providers proportionate to each provider's share of the customer's total energy costs whenever the customer receives service from more than one provider;

(5) A provision that a customer's household income does not include any amount received for energy assistance;

(6) Verification of income by the local energy assistance provider, unless the customer is automatically eligible as a recipient of any form of public assistance, including energy assistance, that uses income eligibility in an amount at or below the income eligibility in Subsection (2); and

(7) A provision that the customer receive, from the local energy assistance provider or other entity, budget counseling and referral to weatherization, conservation, or other programs likely to reduce the customer's consumption of energy.

§20-5-108. To Be Liable for Improper Action.

If a utility does, causes to be done, or allows any act, matter, or thing prohibited by this Title or if a utility fails to do any act required by this Title, such utility shall be liable to the person affected thereby for all loss, damages, and injury caused thereby or resulting

therefrom. Any person may bring an action in Tribal Court to recover for such loss, damage, or injury. If the finder of fact finds that the act or omission was willful, the Court, in addition to the actual damages, may award punitive damages. No recovery under this Section shall affect in any manner a recovery by the Tribe of any fine or penalty provided for in this Title or the power to punish for contempt.

. . . .

———

§20-7-103. Factors in Establishing Rate Adjustments.

In reaching its decision on any request for change in tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, or classifications of an electric utility, the Commission may adopt, in whole or in part, those rates approved or allowed by the State Public Service Commission for the same type or classification of service provided to customers outside the boundaries of the Reservation and within the State. The Commission may adopt such state rates on an interim basis pending full investigation and collection and analysis of data relevant to such rates. Nothing in this Section shall be construed to be a consent to jurisdiction of the State, its agencies or political subdivisions, with respect to the regulation of utilities within the boundaries of the Reservation, such jurisdiction residing exclusively with the Tribe and the Tribal Utility Commission pursuant to the provisions of this Title. The interim adoption by the Commission of any tariff, rate, joint rate, wheeling rate, fare, toll, schedule, or classification established by the State Public Service Commission under this Section shall not affect or in any way limit implementation and enforcement by the Commission of any other provision of this Title relating to tribal regulation of electric utilities within the Reservation.

§20-7-104. Non-Interference with Federal Programs.

In establishing rates under this Chapter for any rural electric cooperative or similar entity operating or providing service within the Reservation; the Commission shall take into consideration the obligations of such electric utilities to the federal government, including the Rural Electrification Administration, and the requirements under federal law applicable to such obligations. Any rates established by the Commission with respect to cooperative electric utilities shall be established so as not to interfere with any federal loan requirements or other federal regulations relating to such electric utilities.

§20-7-105. Reasonable Rates.

Every rate made, demanded, or received by any utility; or by any two or more utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, unreasonably prejudicial or discriminatory, but shall be sufficient, equitable and consistent in application to a class of consumers. To the maximum reasonable extent, the Commission shall set rates to encourage energy conservation and renewable energy use. Any data as to reasonableness should be resolved in favor of the consumer.

APPENDIX C

[SEAL] *Rosebud Sioux Tribe* [SEAL]
Utility Commission Office
P.O Box 430
Rosebud Indian Reservation
Rosebud, South Dakota 57570
Phone: 605-747-4097 ◊ Fax: 605-747-4099
Toll free: 877-837-8729 ◊
Email: tuc99@gwtc.net

Bart Birkeland, Manager May 27, 2009
Board of Directors
Rosebud Electric Cooperative, Inc.
PO Box 439
Gregory, South Dakota 57533-0439
Fax 605-835-9649

Mr. Birkeland & Board of Directors,

The Rosebud Sioux Tribe is a sovereign Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, as amended. Pursuant to the Constitution and By-laws of the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Council is the governing body of the Rosebud Sioux Tribe. Pursuant to the inherent sovereign powers expressly delegated to the Tribal Council in Article IV, Section 1, Subsections (a), (c), (f), (g), (h), (i), (k), (m), (n), and (u) of the Tribal Constitution, the Rosebud Sioux Tribal Council enacted the Rosebud Sioux Tribe Law and Order Code Title 20, to regulate utilities operating within the boundaries of the Rosebud Sioux Tribe Indian Reservation. RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9), defines "Utility" as any person, corporation, or other legal entity, its

lessee, trustee, and receiver, now or thereafter located, operating within or providing services within the Reservation, or maintaining, or controlling within the Reservation, equipment, or facilities for furnishing at retail price telecommunications services; pipeline utilities engaged in the transportation of gas, oil, coal, and water; electric utilities engaged in the generation and distribution of light, heat, or power; gas utilities engaged in the distribution of natural, synthetic, or artificial gas; water companies for the storage and distribution of water for domestic or other beneficial use; heating utilities engaged in the distribution of heat; and all other utilities which operate, maintain, or control any equipment or facilities within the Reservation.

The Tribe creates and establishes the Tribal Utility Commission pursuant to RST Law and Order Code Title 20 Chapter 3 Section 20-3-101. The general jurisdiction of the Rosebud Sioux Tribe Utilities Commission shall extend and include electric utilities engaged in the generation and distribution of light and power. RST Law and Order Code Title 4 Section 20-4-101(c).

Rosebud Electric is a electric service provider, operating and providing electrical services engaged in the generation and distribution of light, heat or power, within the boundaries of the Rosebud Reservation and therefore meets the definition of "Utility" under RST Law and Order Code Title 20 Chapter 2, Section 20-2-101(9).

20-4-101(4) Power of Commission to Establish Rates. The Commission shall supervise all rates, tariffs, and charges of all utilities located or operating within the Reservation. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce all rates, tariffs, and charges of all utilities. Whenever the Commission, after hearing, shall find any existing rates, tariffs, charges, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this Title, the Commission by order shall fix reasonable rates, joint rates, wheeling rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

20-7-101 Changes in Tariff Rates; Notice to Commission. No change shall be made by any electric utility in any tariffs, rates, joint rates, wheeling rates, charges, fares, tolls, schedules, classifications or service which have been filed and published by any electric utility pursuant to this Title, except after 30 days notice to the Commission. Such notice shall state plainly the changes proposed. The Commission, for good cause shown, may allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

In an April 23, 2009 letter from the Rosebud Sioux Tribe Utilities Commission office requested

from Rosebud Electric any rate increase information for the past five years. The Commission office as of this date has not received any response.

The Commission office is requesting from Rosebud Electric rate schedule or rate increase information for the past five years to be filed with the Rosebud Sioux Tribe Utilities Commission office, as required by RST Title 20 Utilities Code. Please provide the rate schedule information requested by June 12, 2009.

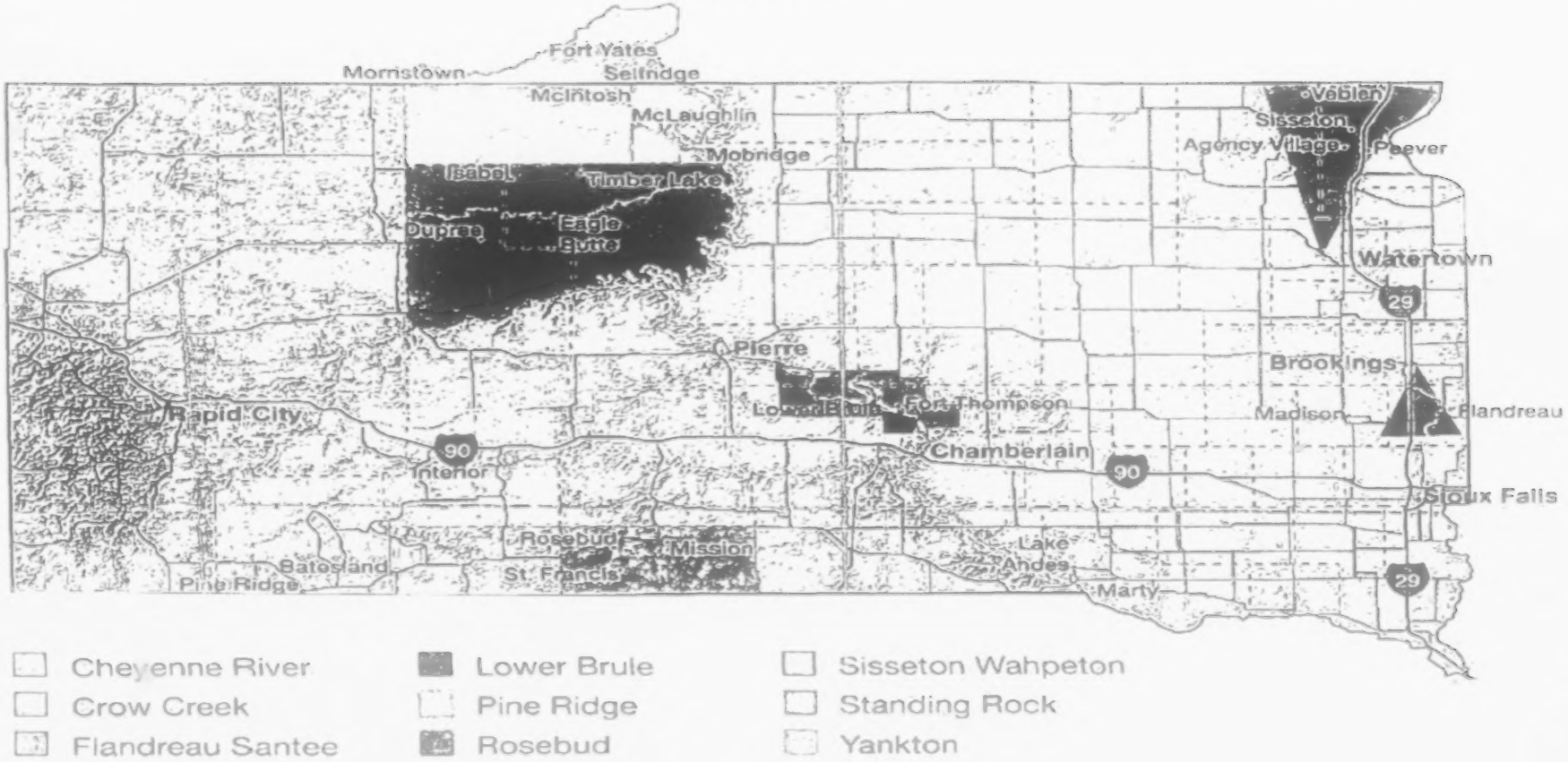
If you have any questions please feel free to call the office.

Sincerely,

/s/ Norman Running, Jr.
Norman Running, Jr.
Executive Secretary
RST Utility Commission

Cc: File

APPENDIX D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Interior
Chamberlain
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St. Francis
Lake Andes
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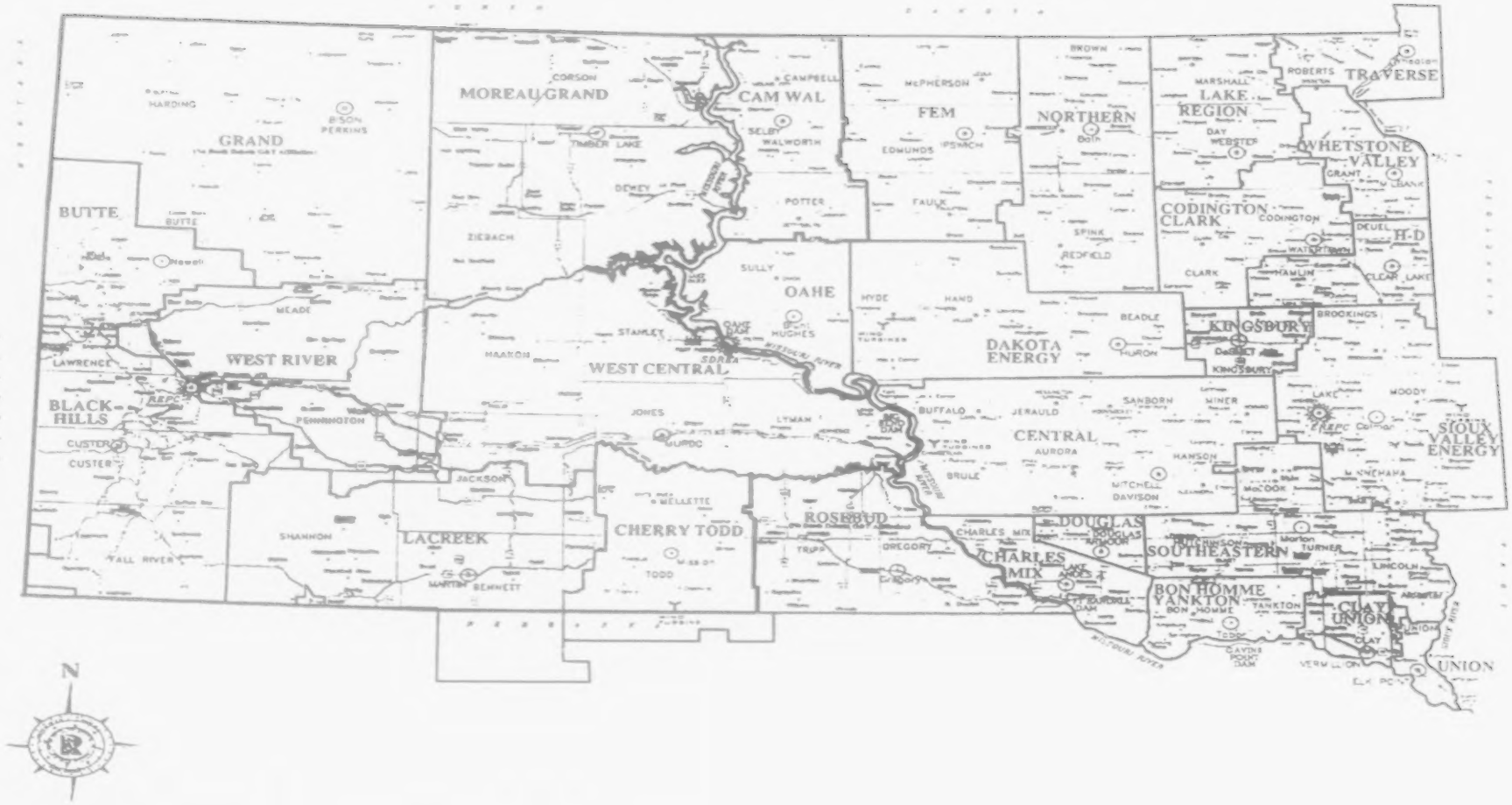
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OAHE
KINGSBURY
DAKOTA ENERGY
WEST RIVER
WEST CENTRAL
BLACK-HILLS
CENTRAL
SIOUX VALLEY ENERGY
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Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al* ,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

CRAIG M PARKHURST
Counsel of Record
PARKHURST LAW OFFICE
P O Box 26
Armour, SD 57313
Telephone (605) 724-2410
Email cplaw@unitelsd com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37(4), the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown, are located within the 1858 boundaries of the Yankton reservation. *Every one of these amici Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here.*[2] Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the *amici* Cities has operated, since its founding a few

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

[2] Even before the post-1948 fee lands (former allotments) were implicated, by the panel *sua sponte*, the United States told this Court that all *amici* Cities, in whole or in part, should be within the Yankton Reservation. "The court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue (230,000 acres of fee lands). Consequently, a significant percentage of the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the County.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah,* 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 356-357 (1998).

In fact, the first time this Court heard oral argument in this case, the Court expressly contrasted responses that minimized the significance of this case, with a picture of confusion submitted by the brief of *amici* Cities. Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 835.[3]

---

[3] That was the first time this issue was presented to this Court Since then, although the participation of *amici* Cities in this litigation has sometimes been limited in the lower courts because of expense, *amici* Cities have always submitted arguments in this Court in support of Petitioners *See generally* Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Petition for Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581); Brief of the Cities Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v. Gaffey* (No 98-4042); Supplemental Reply Brief of Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v Gaffey* (No. 98-4042); Brief for Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae* in Support of Appellants, *Yankton Sioux Tribe v Gaffey* (Nos. 98-3893/3894/3896/3900SDSF); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioners State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, *South Dakota v. Yankton Sioux Tribe* (No. 99-1490); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Brief in Opposition of State and Local Government Parties, *Yankton Sioux Tribe v. Gaffey* (No. 99-1683); Brief *Amicus Curiae* of Cities Dante,

(Continued on following page)

Unfortunately, because the crux of this Court's Opinion has been ignored in the remands, twelve years of additional litigation have compounded the confusion. The United States has consistently ignored this prudential consideration. For these reasons, the issue is still of grave importance to the residents, the *amici* Cities and the other units of local governments in Charles Mix County, South Dakota.

To the extent a picture is worth a thousand words, the confusion is best reflected by the maps originally submitted in an appendix by the State of South Dakota in conjunction with the Petition for Rehearing and Petition for Rehearing *En Banc* in the court of appeals. State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos. 08-1441 and 08-1488) (Map A-Map F).

The State referenced the maps in the following sequence. 1. Historically, the area was simply recognized as a former reservation in the same manner as other areas formerly parts of Indian reservations. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Map B (1994 Former Reservation Area), *amici* Cities App. 2.

Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner in Support of County and State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos 08-1441 and 08-1488).

2. In 1995, the district court determined that the 1858 Yankton Reservation remained entirely intact. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995). Map C (1995 District Court Decision Map), *amici* Cities App. 3.

3. In the first remand, the district court created an entirely new reservation of all the lands which had ever been in allotted status, including over 220,000 acres which had lost allotted status and which were owned by non-Indians. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998). Map D (1998 District Court Decision Map), *amici* Cities App. 4.

4. In the next remand, the district court in *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007), found that all present day allotted land and trust land constituted "reservation" under 18 U.S.C. § 1151(a). Map E (2007 District Court Decision Map), *amici* Cities App. 5.

5. On appeal, the panel also declared, *sua sponte*, that former allotted land held in fee by nontribal members also remained "reservation" if it had lost allotted status after the effective date of 18 U.S.C. § 1151 – June 25, 1948. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 967 (8th Cir. 2009). Map F (2009 Panel Decision Map), *amici* Cities App. 6.

6. As a result, some 8,000 additional acres of fee lands were declared "reservation" despite the fact that at least 7,250 acres of this land are owned by individual non-Indians and local governments. Map A

(Post-1948 Allotment to Fee Patent Map), *amici* Cities App. 1.

Moreover, compounding this confusion is the fact that this sequence of maps does not include other maps that represent additional boundary arguments submitted by the United States and/or the Tribe, but rejected in the remand process, that could also be superimposed on top of this confusion.

If that was not enough, one could also consider the additional Indian country alternative the federal district court proposed, *sua sponte,* that ultimately did not have to be decided, such as the incredible "dependent Indian community" alternative, a "community" scattered over tens of thousands of acres of noncontiguous tracts of trust land and hundreds of miles.

> To the extent any of the trust land discussed in this opinion would be found by an appellate court to not be "reservation" land, and thus not Indian country under *§ 1151(a),* the Court finds such trust land would nevertheless qualify as Indian country under *§ 1151(b),* as a dependent Indian community. . . . If any of the trust land is found by a superior court to not be "reservation" land, and thus not Indian country under *18 U.S.C. § 1151(a),* such trust land qualifies as Indian country under *18 U.S.C. § 1151(b),* as a dependent Indian community.

Yankton Sioux Tribe v. Podhradsky, 529 F.Supp.2d at 1057.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the United States and the Yankton Sioux Tribe that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998).

The Petition for Writ of Certiorari of Charles Mix County summarizes the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases. Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503. This advocacy is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion. The relentless advocacy of the United States provides a perspective from which any submission by the United States in this case should be viewed.

In fact, in its own words, the United States openly acknowledges a "strong interest in protecting the integrity of reservation boundaries." Brief for the United States Supporting Respondents at 1, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581). *Amici* Cities would submit that this Court, in deciding this case, should contrast that "strong interest" advocacy with the obligation of the United States to respect and uphold statutes enacted by the Congress of the

United States and the obligation of the United States to respect and uphold the decisions of this Court that have definitively construed those statutes. In this case, the United States has paid little attention to the role of Congress and this Court in our constitutional system. And the United States pays no attention to the fact that it is obligated to represent all citizens, whether Indians or non-Indians.

All of the above documents *amici* Cities' interest and continuing concern with this litigation, and further supports the Petition for Writ of Certiorari filed by the State of South Dakota, the Petition for Writ of Certiorari filed by Charles Mix County and the Petition for Writ of Certiorari filed by Southern Missouri Recycling and Waste Management District.[4]

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[4] Consideration of the Petitions in this case could be further influenced by an intracircuit conflict involving another case recently decided by a different panel in the Eighth Circuit. The State of South Dakota observed "the Tribe may seek certiorari in *Yankton Sioux Tribe v United States Army Corps of Engineers*, 606 F 3d 895 (8th Cir 2010), likely arguing that it is in conflict with *Podhradsky IV* on this issue." Petition for Writ of Certiorari of the State of South Dakota at 35 The County also pointed out this intracircuit conflict "This decision of the court of appeals conflicts with allotment/fee holding in *Gaffey*, App I, 1999, and conflicts as well with *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), that expressly adopted this aspect of *Gaffey* as the holding in that case" Petition for Writ of Certiorari of Charles Mix County at 20-21 On December 17, 2010, an application was granted by Justice Alito extending the time to file a petition in *Yankton Sioux Tribe v. United States Army Corps of Engineers* (No 10A612) to February 20, 2011

ARGUMENT

I. The decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), reflects the status of this area as understood by the people that live in *amici* Cities.

James Bruguier was convicted of burglary in state circuit court. He later also pleaded guilty to being an habitual offender. Bruguier committed his crime within the 1858 boundaries of the Yankton Reservation. The crime was burglary to a residence in the unincorporated City of Pickstown, South Dakota, on formerly allotted land where Indian title had been extinguished. In a habeas corpus action, Bruguier claimed that the 1858 Yankton Reservation boundaries remained intact and, as a result, the State lacked jurisdiction. The Circuit Judge, the Honorable Kathleen Caldwell, concluded in a Memorandum Opinion and extensive Findings of Fact and Conclusions of Law that the Yankton Reservation had been disestablished. The habeas corpus petition was denied. County App. I, 396, 407.

The Supreme Court of South Dakota, following the lead of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), as well as its own South Dakota cases, unanimously affirmed the circuit court. In the process, the Supreme Court of South Dakota concluded, as did the circuit court, that the 1894 Act "disestablished" and "terminated" the

Yankton Reservation. *Bruguier*, County App. I, 164. *Bruguier* is in direct conflict with the decision of the court of appeals in this case, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010).

Amici Cities anticipate the United States will find a way to argue against certiorari in this case, as the United States routinely does in every case where reservation boundaries have been resurrected (as in this case in 1998), or where reservation boundaries have been fashioned out of whole cloth (as in this case at the present time). Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503.

The last time the United States submitted a brief in this Court in this case (a brief in opposition), that brief keyed on the fact that the *Yankton Sioux Tribe* case in the Eighth Circuit was then in an "interlocutory stage." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683). According to the United States, certiorari should have been denied at that time because the Court would have a "further opportunity" to review the *Yankton Sioux Tribe* decision, together with any subsequent decisions of the court of appeals, after the proceedings on the remand were completed. *See also* the "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) and the "not ripe for this Court's review" argument (*Id.* at 21) and the "not a suitable vehicle" argument (*Id.* at 21). At the time,

the United States summarily dismissed the significance of the scope of *Bruguier*.

Now that the United States can no longer make a credible "interlocutory argument" (*Id.* at 8, 27) or a "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) or a "not ripe for this Court's review" argument (*Id.* at 21) or a "not a suitable vehicle" argument (*Id.* at 21), the *amici* Cities expect the United States to ignore most of the things that the United States told the Court in that brief in opposition regarding the "time enough for this Court to grant review at a later date" argument. We also expect the United States to denigrate the holding of *Bruguier* in a more sweeping fashion. In fact, we fully expect that the main thrust of the United States will be focused on undermining *Bruguier* in order to *obscure* the direct conflict that exists between the court of appeals in this case and the *Bruguier* decision of the Supreme Court of South Dakota.

For that reason, the *amici* Cities will review in detail the scope of the *Bruguier* litigation in the circuit court and the Supreme Court of South Dakota to remove any doubt regarding the extent of the direct conflict between the court of appeals and *Bruguier*.

A. The Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, June 30, 1998, County App. I, 396-406, confirm reservation disestablishment.

The United States would be clearly wrong in claiming that *Bruguier* did not squarely hold that the Yankton Reservation has been disestablished. When *Bruguier* was presented in the circuit court, the circuit court framed the issue in that comprehensive manner:

> In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make *two* separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under 18 USC § 1151(a). If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under 18 USC § 1151(c).

Bruguier v. Class, County App. I, 398 (emphasis added).

The *amici* Cities think that a careful consideration of the manner in which the circuit court decided *Bruguier* will clearly undermine the "no conflict" position. We expect the United States to agree. For that reason, the *amici* Cities emphasize the way in which the circuit court carefully structured the *Bruguier* decision.

With respect to the first issue, the circuit court specifically noted that:

> The Court's first inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in *this* case that the Yankton Sioux Reservation was *disestablished* based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Yankton Sioux Tribe*. . . . In *Yankton Sioux Tribe*, the Supreme Court declined to answer whether the reservation was disestablished because it concluded it was not a *necessary* determination in resolving that case.

Id. at County App. I, 399 (emphasis added).

The analysis of the circuit court begins with a quotation from this Court in *Yankton Sioux Tribe* that recognized the presumption of disestablishment because of the operative language in the Yankton Act. *Id.* at County App. I, 400 (emphasis added).

> This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. . . a "nearly conclusive," or "almost

> insurmountable," *presumption* of diminishment arises.
>
> The terms of the 1894 Act *parallel* the language that this court found *terminated* the Lake Traverse Indian Reservation in *DeCoteau*. . . .

Id. at County App. I, 400 (emphasis added).

The circuit court also rejected the argument that the saving clause precluded disestablishment. Rather, the circuit court noted that in *Yankton Sioux Tribe* this Court concluded that the clause only pertained to the continuance of annuities and not the 1858 reservation border. Accordingly, the circuit court found that the clause was not determinative on the issue of whether the reservation was disestablished. County App. I, 396-406.

The *Yankton Sioux Tribe* decision convinced the circuit court that the 1894 Act terminated the reservation. The circuit court stated that after considering the *Yankton Sioux Tribe* decision the 1894 Act:

> [E]xhibits a clear congressional intent to *terminate* the reservation. The "cession" and "sum certain" language in the Act clearly supports *termination* of the reservation under *DeCoteau*. Also, the *Yankton Sioux Tribe* Court specifically found the language in the Lake Traverse agreement involved in *DeCoteau paralleled* the language in the Yankton Sioux Agreement. 118 S.Ct. at 798.

Id. at County App. I, 402 (emphasis added).

In addition to the *Yankton Sioux Tribe* decision and the operative language in the 1894 Act, the circuit court found further support in the historical context surrounding the passage of the 1894 Act. This documentation included a Presidential Proclamation evidencing "perceived disestablishment" as well as references to the Commissioners' report of negotiations, all of which pointed to the "disestablishment of the Yankton Reservation." *Also see* the circuit court's references to the fact that the common understanding of the parties indicated the 1894 Act "terminated the reservation." County App. I, 405.

1. With specific reference to 18 U.S.C. § 1151(a), the circuit court concluded that the disestablishment found to exist was consistent with the practical realities of how land within the 1858 borders had been treated up until 1995. Citing this Court's decision in *Yankton Sioux Tribe*, as well as another South Dakota Supreme Court decision, the circuit court found that:

> it is clear from Congressional intent, the Presidential Proclamation, the Commissioners' report, the Tribal Constitution, and the later treatment of the lands within the 1858 reservation boundaries that *the reservation was terminated* by the 1894 Act. The allotted lands are *no longer a reservation* under 18 USC § 1151(a).

Id. at County App. I, 405 (emphasis added).

2. The circuit court addressed 18 U.S.C. § 1151(c) and also cited additional state cases dealing with areas, like the original Yankton area, where the original reservation boundaries were deemed to be extinguished. *See Hollow Horn Bear v. Jameson*, 95 N.W.2d 181 (S.D. 1959). The circuit court found that "an allotment to which Indian title has been extinguished . . . at the time the crime was committed . . . was no longer Indian country under 18 USC § 1151(c)." *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), cited in the County Petition and discussed at length in the Petition of Southern Missouri at 11, is also detailed and instructive on this point.

B. The Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, August 14, 1998, County App. I, 407-430, confirm reservation disestablishment.

Subsequent to the circuit court's memorandum decision, the Petitioner in *Bruguier* moved for reconsideration and permission to supplement the record. Over the objection of the State, the circuit court allowed both parties to supplement the record and the circuit court reconsidered the case. As a result, the Findings of Fact and Conclusions of Law in the circuit court are explicit. They reference:

> relevant decision of the courts, the record in *State v. Greger*, 1997 S.D. 14, 559 N.W.2d

> 854 (which incorporates the record in the case which reached the United States Supreme Court [*Yankton Sioux Tribe*]), the affidavits, the supplemental materials referred to above, and the stipulation of the parties. The parties have stipulated, inter alia, that the burglary occurred on allotted land, the Indian title to which has been extinguished.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 409-410. As noted above, in the findings, the parties stipulated that the burglary occurred on allotted land, "the Indian title to which has been extinguished" (fee land). Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 410.

The circuit court set forth twenty-two pages of Findings of Fact and Conclusions of Law. As a result, the basis for the *Bruguier* opinion in the South Dakota Supreme Court was solid. It was not simply based on "reasoning" set forth in the opinion, as we expect the United States will claim. For example, Finding #17 stated:

> Prior to 1998, the Tribe has never alleged that a reservation existed which constituted all of the lands which were allotted to individual members in 1894, regardless of whether those allotments had been transferred into non-Indian hands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 411. In addition, the circuit court referenced its own files in Finding #22.

> This Court also takes judicial notice of its own files and finds that this Court, which is vested with civil and criminal jurisdiction over the affected area, has not distinguished between allotted lands in non-Indian ownership and ceded lands in non-Indian ownership. All of these nontrust lands have been treated as *nonreservation* and non-"Indian country" lands within state jurisdiction as a *historical matter* up to the time of the *Yankton Sioux Tribe* case.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 413 (emphasis added).

Other findings confirm that same understanding with a variety of files. Finding #22A, for example, confirmed that the *only* Indian country remaining in the area, in the understanding of both the Indians and non-Indians, was allotments, the title to which had *not* been extinguished. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #22A, County App. I, 413-414.

In other instances, the circuit court relied upon affidavits and related materials. Even the records of the United States confirmed the conclusion of the circuit court. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added), where the Acting Solicitor declared that the office had "assumed criminal jurisdiction *only* to the extent provided . . . on *unpatented* . . . " trust tracts. As the circuit court points out, the

balance of the finding confirms that the United States previously acknowledged disestablishment:

> *no reservation existed in the area* under 18 USC § 1151(a) and that the *only* "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 USC § 1151(c).

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added). Other documentation further confirmed the position reflected in the circuit court's files.

Most recently, maps circulated by representatives of the United States following the decision of this Court in *Yankton Sioux Tribe*, together with maps submitted by the state's attorney and the city attorneys, indicated to the circuit court the "absurd" jurisdictional result which would occur if the theory of the habeas Petitioner in *Bruguier* was adopted. Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #30, County App. I, 419-420.

The conclusions of law are explicitly tied to these findings of fact (a total of thirty-six). In conclusion, the circuit court stated:

> The Court concludes that *no lands within the area of the 1858 reservation retain "reservation" status pursuant to 18 USC § 1151(a).* The original Indian allotments which retain allotted status (in other words, those Indian allotments, the Indian titles to which have not been extinguished), retain "Indian country"

> status pursuant to 18 USC § 1151(c); the incident, however, is *not* alleged to have occurred on such lands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Conclusion #24, County App. I, 429-430 (emphasis added).

C. *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, confirms reservation disestablishment.

The South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, was fortunate to have the extensive record and comprehensive Memorandum Opinion and Findings of Fact and Conclusions of Law of the circuit court.

The South Dakota Supreme Court first noted the holding of the circuit court that "the reservation had been 'disestablished' and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151." *Id.* at County App. I, 166. And then the South Dakota Supreme Court expressly contrasted that holding with the position of the federal district court:

> On the same day the circuit court signed the findings, *the U.S. District Court ruled that the 1858 boundaries remain intact* . . . 14 F.Supp.2d 1135 (D.S.D. 1998).

Id. (emphasis added).

In this remarkable ruling of the federal district court, which the United States later neglected to bring to the attention of this Court, even after the federal district court was reversed in *Gaffey*, which the United States also neglected to bring to the attention of this Court, the federal district court simply ignored this aspect of the decision of this Court in *Yankton Sioux Tribe* and the express language set forth in the text of the Opinion. This Court made clear that the 1858 reservation boundaries of the Yankton Reservation were not maintained. "The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. . . . [W]e conclude that the saving clause pertains to the continuance of annuities not the 1858 borders." *Yankton Sioux Tribe*, 522 U.S. 329, County App. I, 344-345, 347 (emphasis added).

With the benefit of the decision in *Yankton Sioux Tribe*, the South Dakota Supreme Court clearly understood the issue.

> More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c). . . . In *Yankton Sioux Tribe* . . .

> [t]he Court limited its holding . . . Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary . . . the Supreme Court . . . found that the 1894 Act is 'readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries.'

Id. at County App. I, 177-180.

The Supreme Court of South Dakota also referenced the briefs in the Joint Appendix from "*Yankton Sioux Tribe, et al. v. Gaffey, et al.* (8th Cir. 1999)," in addition to the record in *Yankton Sioux Tribe*. *Id.* at County App. I, 166. Then, the South Dakota Supreme Court also recognized the importance of the General Allotment Act. County App. I, 167, 182.

The Supreme Court of South Dakota respected the general principles set forth in *Yankton Sioux Tribe*. The Court stressed the importance of *DeCoteau* in *Yankton Sioux Tribe*. *Id.* at County App. I, 181, 195-196. The presumption of disestablishment was attributed to the language of the Yankton Act as set forth in detail at County App. I, 181. The Court found:

> Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved even for tribal purposes. It was decades after the reservation was opened

> that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub. L. No. 70-729, 45 Stat. 1167 (returning to Tribe 1000 acres titled in United States that had been [ceded to the United States but] reserved in the 1894 Act. . . .

Id. at County App. I, 185.

The fact that no land was reserved even for tribal purposes was contested by the United States and the Tribe in oral argument in *Yankton Sioux Tribe* (unresolved at that time and "crucial" according to at least one member of the Court). Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 845.[5] (In the remand, the fact that no land was reserved even for tribal purposes was not challenged by the United States or the Tribe, as documented in the opinion of the federal courts.)

Importantly, the Court recognized that after the cession "tribal title" did not involve allotments, as Felix Cohen explained in the initial Federal Indian Law text. *Id.* at County App. I, 183. As Charles Mix County has pointed out, the United States and tribal

---

[5] In one exchange, Justice Scalia tried to get to the crux of the issue. County App. II, 844-845. But the Yankton Sioux Tribe and the United States did not come forth with the correct answer to the question (no lands in common, as Justice Scalia suspected). As a result, *Yankton Sioux Tribe* did not definitively resolve the status of the Yankton Reservation.

advocates ordinarily cite later tribal advocacy editions of this Cohen text, but at this stage in the *Yankton Sioux Tribe* proceedings, such references are "remarkably absent." Petition for Writ of Certiorari of Charles Mix County at 32. Moreover, the *amici* Cities agree with the County that Federal Indian Law texts undermine the position of the United States and the Yankton Sioux Tribe in this case, as well as the opinions on the remands.

Under the subheadings of "Historical Context" and "Regulated Developments in the Area," *Bruguier* discussed the history of the 1894 Act and every significant argument that had been advanced in opposition to reservation disestablishment since *Yankton Sioux Tribe*. The Court concluded the discussion in no uncertain terms.

> In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. *Today we proceed further . . . We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act.* Nor is it trust land, a dependent Indian community, or property held by the Tribe.

Id. at County App. I, 197 (emphasis added).

In conclusion, we agree with the County that had the comprehensive opinion in *Bruguier* been decided at the time this Court decided *Yankton Sioux Tribe*, the twelve years of remand litigation, instituted by the United States and the Yankton Sioux Tribe since that time, would have been unnecessary and could not have been maintained.

Moreover, *amici* Cities also agree with the State and the County that some type of summary disposition in this case may be appropriate. Petition for Writ of Certiorari of the State of South Dakota at 38, n.9. Petition for Writ of Certiorari of Charles Mix County at 8, n.2. In *Yankton Sioux Tribe*, this Court provided the lower courts with an opportunity to clean up a result that should never have been adopted in the first place. The district court and the court of appeals did not appreciate that opportunity and continued to go down the wrong path, essentially ignoring the direction of this Court in *Yankton Sioux Tribe*. In *Bruguier*, the Supreme Court of South Dakota meticulously adhered to the teachings of this Court in *Yankton Sioux Tribe* in every respect. For that reason, summary consideration in conformity with *Bruguier* seems particularly appropriate at this time.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste

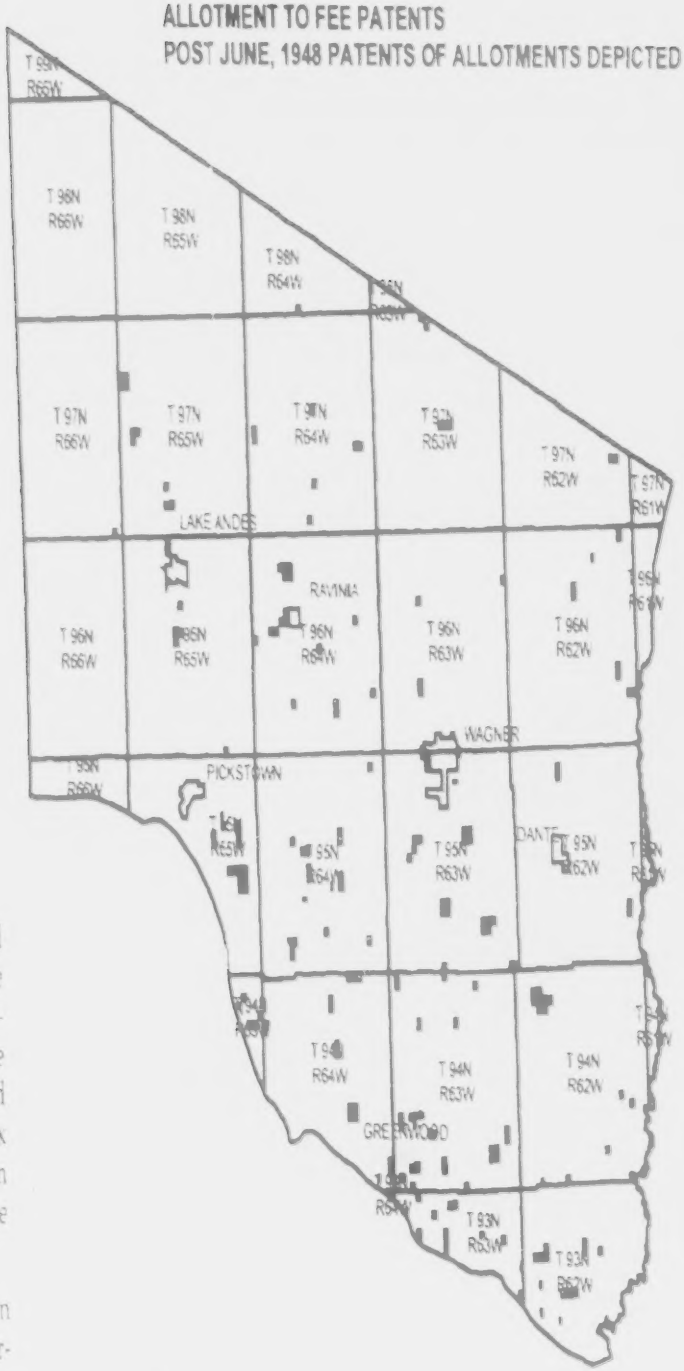
Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

CRAIG M. PARKHURST
Counsel of Record
PARKHURST LAW OFFICE
P.O. Box 26
Armour, SD 57313
Telephone: (605) 724-2410
Email: cplaw@unitelsd.com

CHARLES MIX COUNTY, SOUTH DAKOTA
POST JUNE 1948
ALLOTMENT TO FEE PATENTS
POST JUNE, 1948 PATENTS OF ALLOTMENTS DEPICTED IN RED



City Limits

Patents Post June 1948

10/30/2009 nms Charles Mix County
GIS Administrator

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The drawing was electronically produced on Charles Mix County Geographic Information System.

MAP A

10/30/2009 nms Charles Mix County
GIS Administrator

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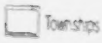
MAP B

1995 District Court Decision
Yankton Sioux Reservation
("Reservation" lands depicted in red)



10/30/2009 nms Charles Mix County
GIS Administrator

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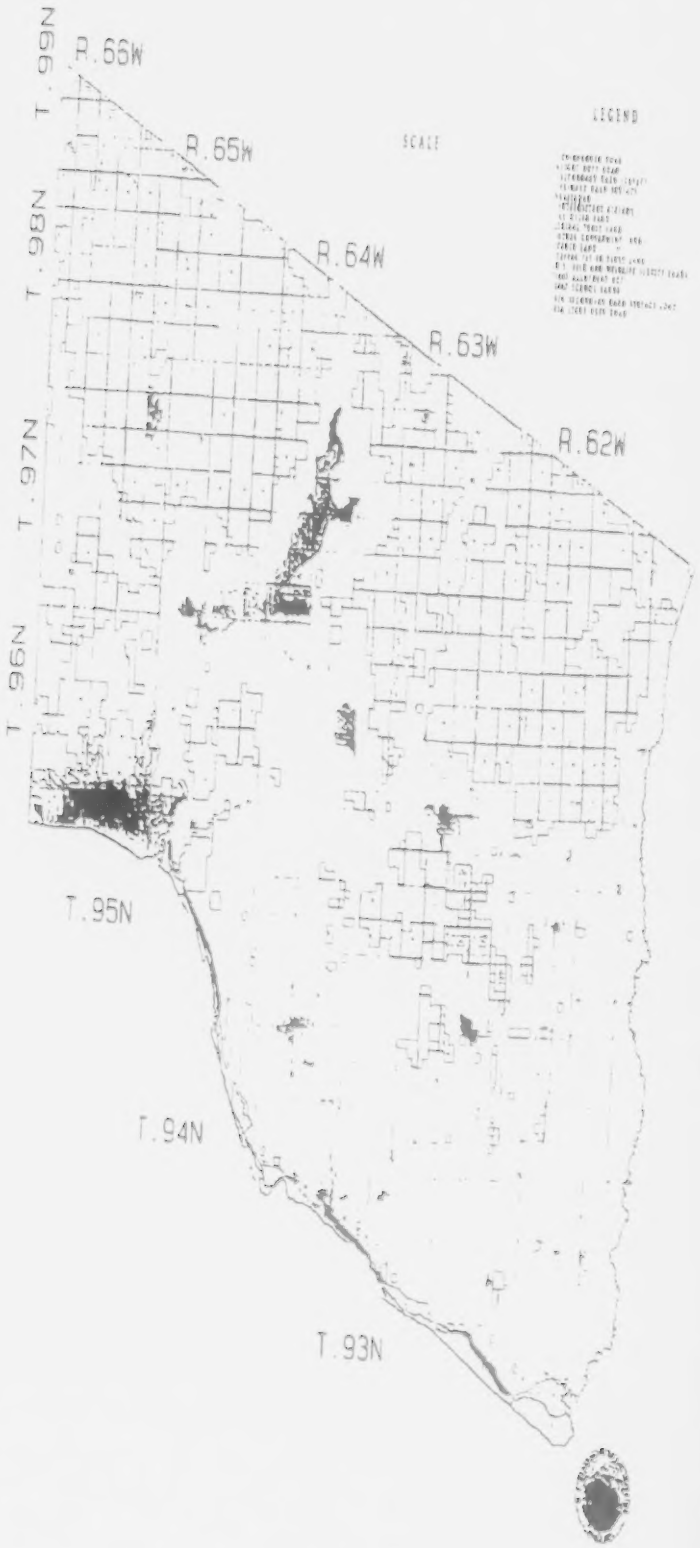
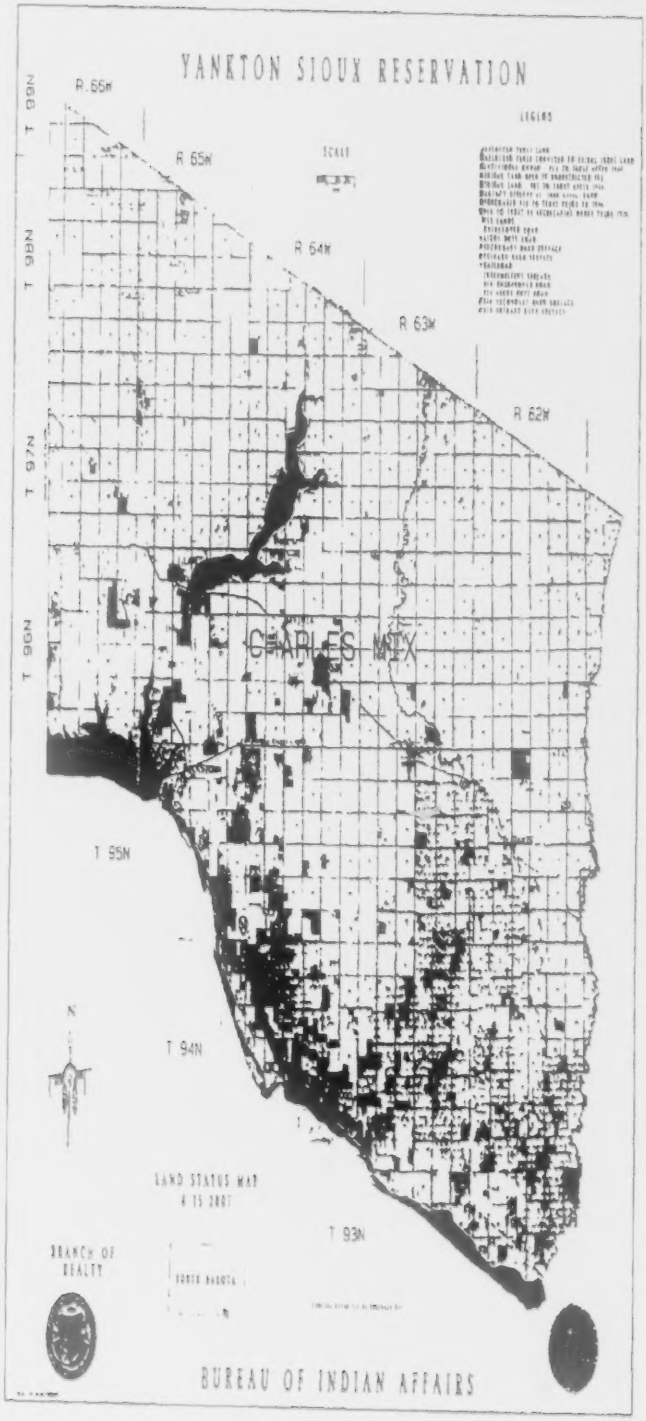
MAP C



MAP D

1998 District Court Decision Map
("Reservation" includes all areas in red)
Source: Brief of Appellant Yankton Sioux Tribe
in Yankton Sioux Tribe v. Corps of Engineers,
No. 08-2252 (8th Cir.), at Add. 69.

2007 District Court Decision Map
("Reservation" includes all darker
squares, except for the blue-grey squares)
Source: Ex. 209 in Yankton Sioux Tribe
v. Podhradsky, Civ. 98-4042



MAP E

2009 Panel Decision
Yankton Sioux Reservation
("Reservation" includes
bright red squares,
and all darker squares,
except those in blue-grey.)

Source: Ex. 209 in Yankton Sioux Tribe v. Podhradsky, Civ. 98-4042, plus the post June 25, 1948
See patents as they are also shown on Map A.
See County description below

City Limits
Patents Post June 1948

10/30/2009 nms Charles Mix County GIS Administrator

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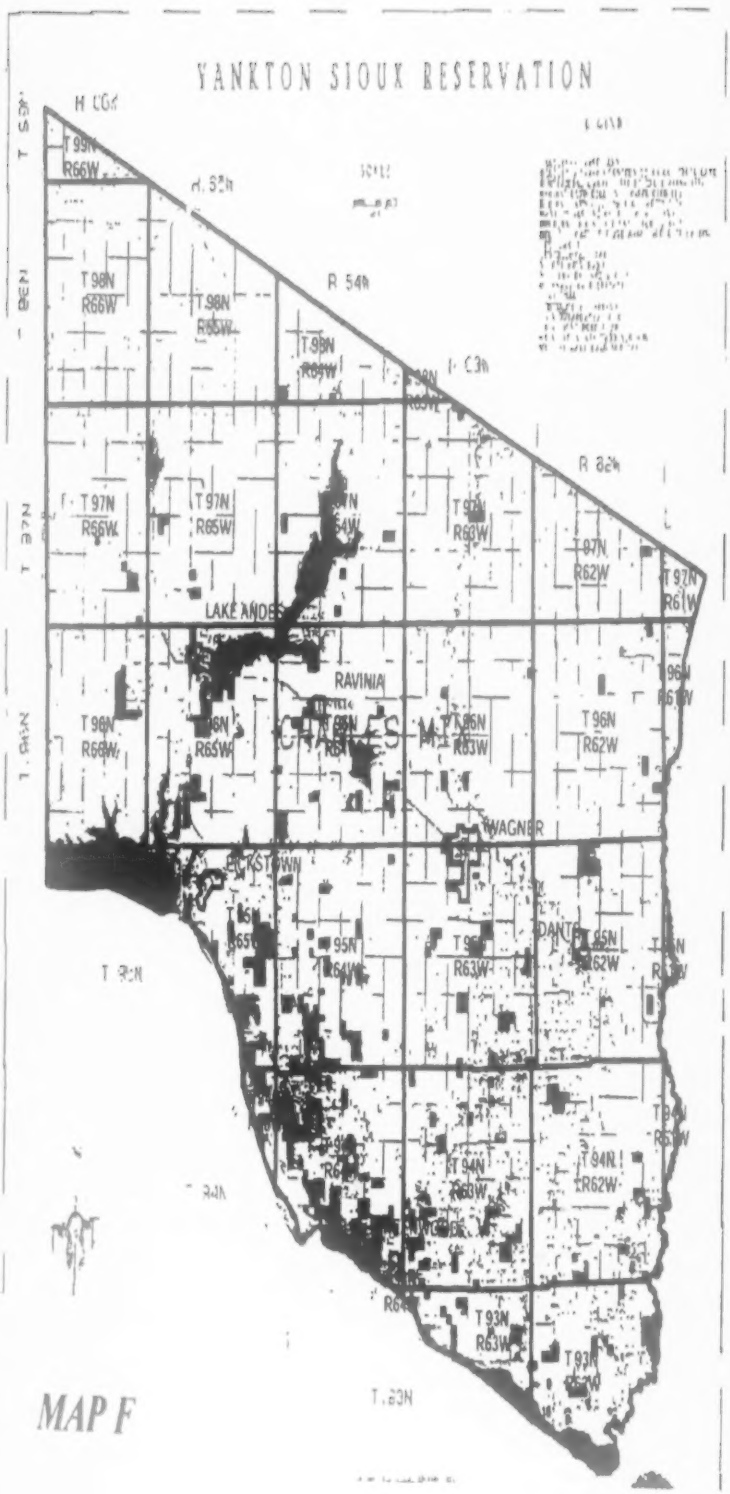

(5) (5) (10)

Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 21 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS DAUGAARD, Governor of South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

PAM HEIN, State's Attorney of Charles Mix County, South Dakota, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF FOR COLIN SOUKUP, REPRESENTING THE FRANK SOUKUP FAMILY LIMITED PARTNERSHIP, AND DAN CIMPL IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
E-mail: whalawtim@cme.coop
Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF *AMICI* LANDOWNERS[1]

The representative landowners in this matter are Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl. The original *amici* landowners in the trial court and United States Eighth Circuit Court of Appeals were Leonard Kreeger, Colin Soukup, representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl; however, two of the original *amici* landowners requested that their name be removed from this brief due to hostile actions attributable to the Bureau of Indian Affairs (BIA) and the Yankton Sioux Tribe (YST).

A. Hostilities of the USA/YST toward the landowners.

There have been arguments asserted in the lower Courts by the USA and the YST that *Podhradsky* will not change the relationship between the Indian and non-Indian citizens of Charles Mix County. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). This is not true. A prime example of the YST and BIA hostility is as follows:

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

The representative landowners on the three most recent *amicus curiae* briefs filed in the lower court were Leonard Kreeger, Colin Soukup, Representing the Frank Soukup Family Limited Partnership, Mark Van Duysen and Dan Cimpl. All of the initial representative landowners or their immediate family members leased land from the YST and had done so for numerous years. One landowner and his family had leased land from the YST for approximately 70 years. Generally, the BIA engages in a process for the lease of the YST land whereby the current tenant of the land executes a document entitled "Allotted Land Request For Negotiated Lease" (Request) and sets forth on the Request the amount of rent he is willing to pay for the property. The YST either accepts or rejects the Request. If the Request is accepted, it is then signed by the YST, the BIA and the landowner. After the Request is signed, a lease is then required to be signed by the YST and the landowner and thereafter approved by the BIA Superintendent. This process was followed with regard to YST property leased by the representative landowners, as well as other affected landowners for numerous years. In accordance with the above process, each of the landowners had submitted a Request and the YST and BIA had approved same. In certain instances, the landowner and the YST had already signed the leases, but approval from the BIA was pending.

This process had occurred several weeks before the *amicus curiae* briefs were to be filed in the Eighth Circuit. After the filing of the final *amicus curiae*

brief in the Eighth Circuit, the leases for the YST land that had been awarded to certain landowners who participated in or supported the *amicus curiae* efforts were revoked by the BIA Superintendent, Ben Kitto. When Mr. Kitto was approached by certain landowners regarding a reason for the delay in the issuance of their leases, Mr. Kitto advised that their leases would not be forthcoming for the sole reason that the representative landowners filed briefs in support of the State of South Dakota and Charles Mix County in this litigation. As a result of the revocation of their leases, the YST property was to be offered for bid in a competitive bidding process. The landowners were further advised by Mr. Kitto that, even if they submitted the high bid under the new bidding process, because of their participation in the litigation, they would not be awarded the lease for the YST property.

It was made abundantly clear to the representative landowners that unless they stopped supporting the State of South Dakota and Charles Mix County in this litigation, the YST and the BIA would impose financial punishment upon them in perpetuity. Given the sovereign immunity of the YST, the landowners were left without a legal remedy and without an opportunity to redress the patently wrongful and malicious conduct of the YST and the BIA. The vindictive conduct of the YST and the BIA was not limited to landowners who participated in the litigation, but also extended to those landowners who the YST and BIA discovered had contributed financial support to the representative landowners in this litigation.

The above conduct was brought to the attention of Ken Salazar, Secretary of the Interior; however, no response nor remedial action was taken by the USA, the BIA or the YST. Consequently, the representative landowners on this brief have been reduced to two since the financial consequences suffered by the other *amici* landowners was so severe that it caused them to withdraw their names from this brief.

Other relationships with Indian individuals and the YST previously enjoyed by the landowners personally or through their businesses have been damaged if not completely destroyed. The net effect of this litigation and the fallout associated therewith is that it has created hostility, anger and vindictiveness because of the legal maneuvering by the USA and the YST and the failure on the part of the Courts to resolve in a conclusive manner the issues herein. *See*, State of South Dakota's Petition for Writ of Certiorari, at 35-40. A resolution must be reached or the tension and angst associated with this case will continue.

The landowners submitting this brief represent not only themselves, but also numerous other landowners who are similarly situated.

B. Historical aspects of landowners' interests.

In *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25, 2009) the United States Court of Appeals for the Eighth Circuit held, among other things, that all lands acquired by non-Indians from

Indian persons subsequent to the enactment of 18 U.S.C. § 1151 on June 25, 1948, were reservation lands under § 1151(a). This decision also created mini reservations under § 1151(a) by placing boundaries around certain trust lands located within Charles Mix County.

The Eighth Circuit amended its opinion in the *Podhradsky* case pursuant to an Order on Petitions for Rehearing which was entered by the Court after petitions for rehearing and review of the original opinion had been filed by the State of South Dakota and Charles Mix County. *See*, State of South Dakota's Petition for Writ of Certiorari, App. 1 and 52. The main modification to the original *Podhradsky* opinion was to remove footnote number 10. *See*, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). It seemed apparent from the Order on Petitions for Rehearing that the Eighth Circuit intended to down play the impact regarding the status of lands acquired by non-Indians after June 25, 1948. Although the amended opinion removed footnote 10, the operative language within the original opinion remained and the concerns of the various landowners regarding the status of their lands has not changed. Moreover, the language in the amended opinion clearly provides the rationale for the declaration of the post-1948 fee lands as reservations.

All of the landowners have an interest in lands that were acquired by them or their grantors after the enactment of 18 U.S.C. § 1151 on June 25, 1948. Most of the landowners affected by the amended

Podhradsky decision engage in farming or ranching or other agricultural related businesses on their property. Certain landowners have passed their ownership interests to their family members over the years with the hope to see their family farms continue to exist in the same fashion as their ancestors. Other landowners have commercial businesses on affected property or have housing interests thereon. The decision rendered in the amended opinion in *Podhradsky* adversely impacts the rights and privileges of the parties as well as the citizens, cities, governmental subdivisions, and entities in Charles Mix County, but it has a particularly severe impact on the landowners. The impact on the landowners is to such an extent that they believe that their interests must be considered by the United States Supreme Court as it determines whether or not to grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

In addition to the above, the *Podhradsky* decision has a discriminatory effect on the landowners in at least two significant ways. First, many of the landowners receive utility services in Charles Mix County from Charles Mix Electric Association, Inc. (CME), a rural electric cooperative, and Randall Community Water District (RCWD), a political subdivision of the State of South Dakota. The decision impacts these local utility companies since under the current federal regulatory scheme and federal case law, civil and regulatory jurisdiction of an Indian Tribe is directly

linked to the status of the land. If the land is determined to be Indian Country under 18 U.S.C. § 1151(a) due to its reservation status, then the YST will assert civil and regulatory authority over entities who are present on or engage in business on the § 1151(a) reservation land. *See*, *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. et al.*, 554 U.S. 316 (2008). CME and RCWD provide utility services to the affected landowners, as well as Indians and non-Indians who reside on and off the newly created § 1151(a) reservation lands. Since the YST asserts regulatory authority over the above entities on § 1151(a) reservation lands, it may claim a right to regulate the utility rates, enforcement procedures, and other aspects of the utility providers' services to Indian persons on said reservation lands. Moreover, given the status of the governing case law, the YST can disregard the in-house rules, by-laws and regulations of CME and RCWD and, to a certain degree, the federal regulations that govern the above entities. *See*, *Plains Commerce Bank*, 554 U.S. at 329-330. The net effect is that the landowners and other non-Indian customers will be treated differently than Indian customers who receive the same utility services from the above entities and thereby suffer a discriminatory effect from the impact of the *Podhradsky* decision.

Secondly, many of the *amici* landowners reside in the Wagner School District and send their children to

the Wagner public schools. The *Podhradsky* decision impacts the Wagner School District due to the fact that the school is situated on property acquired after 1948. Since the Wagner School system is now on YST reservation land, Indian students will be subject to the jurisdiction of the YST and its tribal courts with regard to certain matters that occur in school. Consequently, the YST arguably will be able to impose upon the Wagner School system its requirements for student discipline and other matters associated with the operation of the school.

In addition, the creation of reservations on the post-1948 fee lands under the *Podhradsky* decision will subject the landowners to civil and criminal jurisdiction by the YST which did not exist before.[2] Further, as a result of *Podhradsky* and the attitude adopted by the YST and the BIA, many of the landowners have suffered financially.

Finally, the Court's amended decision in *Podhradsky* leaves a clear conflict with the decisions rendered by this Court and the South Dakota Supreme Court and begs for a resolution of the issue left undecided in the *Yankton* case. *See, South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Consequently, it is important that this Court resolve not

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[2] After the 1995 decision by the District Court and the decision by the Eighth Circuit, jurisdiction was changed for a period of time until these decisions were reversed by the United States Supreme Court in the *Yankton* case.

only the injustice suffered by the landowners, but also the conflicts with the *Podhradsky* decision due to the Eighth Circuit's refusal to adhere to the doctrine of *stare decisis*.

ARGUMENT

A. Impact upon the landowners.

The landowners in the area affected by the *Podhradsky* decision have been devastated, once again, by an unfair, unprecedented, and unjust decision by the Eighth Circuit.

1. Justifiable expectations of the landowners.

In Indian jurisdiction cases, courts are required to consider in depth the justifiable expectations of the people impacted by the court's decision and these expectations should not be ignored or simply swept aside. *See*, *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). The Eighth Circuit's Order on Petitions for Rehearing indicated, in part, that the basis for the modification of the original *Podhradsky* decision regarding the lands acquired after June 25, 1948, was to give due regard to the justifiable expectations of the people impacted by the Court's original decision. The amended opinion, however, fell far short of accomplishing this goal and the justifiable expectations

of the landowners was clearly ignored and swept aside.

Moreover, the historical aspect of the area subject to the litigation in *Podhradsky* was largely ignored by the Eighth Circuit in favor of a decision that adversely impacted the landowners. The South Dakota Supreme Court, following the lead from this Court in *Yankton*, recognized that a court cannot

> . . . ignore the palpable reality that, as the years passed after the 1895 opening, no one behaved as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the State, not the homesteaders, not the townspeople. However carefully we may pore over the thousands of words in treaty negotiations, in chronicles, in agency reports, in statutes, in latter day scholarly exegesis, we cannot ignore the historical actuality of what happened following the opening. The area was utterly transformed. . . . Following a recurrent theme, first came the settlers, then the railroads, then the towns, and businesses. This precipitous change in regional character is undeniable. If not dispositive of the question, it certainly has a persuasive bearing on our decision. . . . With the opening of the reservation came law and order administered by the State, with few exceptions. . . . No distinction was made between ceded lands and allotted lands that passed out of Indian hands. The "single most salient fact [relating to later jurisdictional history] is the unquestioned

> actual assumption of state jurisdiction. . . ." . . . In Yankton Sioux Tribe, the Supreme Court considered this factor influential: "The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing unchallenged to the present day, further reinforces our holding." . . .

Bruguier v. Class, 599 N.W.2d 364, 375-376 (1999), citing *Yankton*, 522 U.S. at 356-357, and *Rosebud Sioux Tribe*, 430 U.S. at 603. Clearly, the justifiable expectations and the understanding of the parties who resided in the area subject to reservation litigation is critical to a fair and just decision by any appellate court.

In addition, the amended opinion left the impact of the original opinion virtually unchanged as it relates to the affected landowners because the operative language relative to the issue affecting the landowners remained in the amended opinion. Consequently, it is important that this Court remedy the shortfall of the Eighth Circuit and give due consideration, regard and weight to the position of the landowners affected by the amended *Podhradsky* decision.

2. Effects of the litigation on the landowners.

The status of certain lands in Charles Mix County have been the subject of litigation for numerous years, but the most intense and, perhaps, the most damaging litigation has been during the past 15 years. The intense litigation began in 1994 when the

YST sued Southern Missouri Waste Management District. *See, Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995). The trial court and the Eighth Circuit resurrected the old 1858 reservation boundaries, and changed over 100 years of the understanding and expectations of the citizens in Charles Mix County. These decisions, however, were reversed by the United States Supreme Court in a unanimous decision in the *Yankton* case. The *Yankton* case appeared to resolve the disputes which involved the landowners' property and placed them back in the status quo with regard to their landowner rights and privileges under the law.

At the trial in this case, the landowners appeared to be, once again, in the sights of the YST and the USA with regard to certain claims and arguments.[3] The arguments advanced by the USA and YST at trial were clearly contrary to the governing law, but, nonetheless, placed the landowners in a precarious situation with regard to their property rights and privileges as protected by and afforded to them under the United States and South Dakota Constitutions.

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[3] At the second trial YST and the USA argued, among other claims, that 25 U.S.C. § 398d (1927 Act) and/or the Indian Reorganization Act of 1934, 25 U.S.C. §§ 2 and 4 (1934 Act) froze the reservation boundaries. The YST and the USA argued that as a consequence of the 1927 and 1934 Acts certain lands must be considered to remain within the boundaries of the Yankton Sioux Reservation. Even the Trial Court and Eighth Circuit rejected these arguments

If these arguments were to prevail, many of the landowners' rights and privileges associated with their lands would be destroyed. At trial, no evidence was presented, nor any claims or arguments made by any parties, that lands acquired by non-Indian persons from Indian persons after June 25, 1948, should be granted reservation status.

The trial court decision did not mention, nor did it attach any significance to the June 25, 1948, date with regard to the creation of reservation lands. Consequently, the landowners' rights and privileges appeared to remain intact, as contemplated by the *Yankton* decision and the long line of decisions prior thereto from this Court and the South Dakota Supreme Court.

The landowners' enjoyment of their rights and privileges, however, was short lived. The Eighth Circuit heard and considered arguments, but none of the arguments asserted by the parties attached any significance to land acquisitions in relation to the date of the enactment of 18 U.S.C. § 1151. In spite of the lack of a factual record and legal arguments, a decision was rendered which was unsupported from a factual and legal standpoint. The *Podhradsky* decision is particularly unsettling in light of the unprecedented significance attached to the differentiation of the rights of landowners by virtue of the date of the acquisition of their property. The *Podhradsky* decision placed reservation boundaries around fee land owned by non-Indian persons simply based upon the time in which the land was acquired. Moreover, the decision

created mini reservations throughout Charles Mix County and thereby created an impossible situation for the businesses and landowners in the affected area.

Since *Yankton*, the landowners have been required to endure repeated legal assaults by the YST and the USA on their rights and efforts to enjoy their property in peace and tranquility. While the *Yankton* decision appeared to resolve the differences of the citizens in Charles Mix County, repeated efforts by the YST and the USA and the strained rationale of the Eighth Circuit in *Podhradsky* and other Indian law cases, have kept the litigation alive and thriving to this date. *See*, State of South Dakota's Petition for Writ of Certiorari, Statement of the Case, at 5-16; and Charles Mix County's Petition for Writ of Certiorari, Statement of the Case, at 10-16. Moreover, if the rationale of the amended opinion in *Podhradsky* is left to stand, many of the landowners' rights and privileges associated with their property will be destroyed.

3. Adverse alteration of the status quo.

The adverse alteration of the status quo and the rights of the landowners in the affected area of Charles Mix County are exemplified by the following:

a) Landowner rights.

A landowner's safe harbor for himself and his family is his home and, in rural America, his land.

This means that one can always take solace in the fact that when he is on his property, his rights are paramount and protected by the United States Constitution, the South Dakota Constitution and the body of laws enacted pursuant thereto. Ownership and possession of the land governs and dictates the rights one has related thereto and the fashion in which his rights may be asserted and protected. Part of these rights include the right to exclude whomever a landowner desires from his property. This would no longer be the case with regard to the affected landowners if *Podhradsky* is not reversed. *Podhradsky* places reservation boundaries around fee lands that are owned by non-Indian persons and arguably subjects them to laws and regulations by a sovereign nation that is foreign to them and which has no ownership interest in their lands. Moreover, the landowners would be subject to a tribal government in which they are prohibited from voting or otherwise voicing their opinions on other governing matters. Unlike laws that are enacted by the USA or South Dakota, the landowners have no right to be involved in the process of enacting the very laws, rules and regulations that will directly affect their lives, nor will they have the right to be involved in the enforcement process associated with said laws.

As an example of the absurd situation created by the *Podhradsky* decision, one merely needs to examine something as common as zoning. Charles Mix County does not have a zoning ordinance and a landowner can construct a livestock confinement unit

(LCU) on his property so long as he complies with South Dakota law. This is not the case with the affected landowners here. If the affected landowners desire to construct an LCU on their property, which is now a reservation, they must arguably comply with any zoning ordinance enacted by the YST. Further, they must arguably comply with the YST's Tribal Employment Rights Ordinance (TERO) and its ordinances governing the operation of a business on reservation lands. This means that not only will the affected landowner be required to pay a TERO tax on his operations, but he will be required to purchase a business permit or license from the YST. Moreover, given the attitude and actions of the BIA and the YST since *Podhradsky* as discussed herein, it is entirely likely that the YST will treat the landowners on the affected property differently and more harshly than an Indian person who is similarly situated. The harsh reality of the *Podhradsky* decision is that it will be used to permit the YST to control the use, ownership and occupation of land when it does not own the land, does not have any trust or leasehold interest in same, and has not contributed to the acquisition or maintenance of the land in any regard. This is absurd, an abomination, and most definitely contrary to generally accepted property law concepts.

In addition, many of the affected landowners currently engage in business on their property. In light of *Podhradsky*, the YST arguably will be in the position to require the affected landowners to either pay a TERO tax or secure a business permit or license to

continue to engage their businesses on their own property even if they do not modify or expand their operations in any regard. Moreover, the landowners could be subjected to taxation and fees to be imposed by the YST and they have no right to challenge or contest the assessment of these taxes and fees in any court of competent jurisdiction.

b) Criminal jurisdiction.

Criminal jurisdiction on the affected land will change dramatically under *Podhradsky*. After the District Court recognized the 1858 boundaries of the YST Indian reservation in 1995, local law enforcement officials met with tribal and federal officials to discuss jurisdictional issues and the logistics associated therewith. At this meeting, an Assistant U.S. Attorney made the comment that jurisdiction is not subject to debate, the agreement of the parties, or other principles, as a governmental entity either has jurisdiction or it does not. This is true. *Podhradsky* gives to the YST criminal jurisdiction over the affected lands – period. No amount of discussion or legal manipulation can change this. Consequently, if a crime is committed on the post-1948 reservation lands, the landowner will no longer call the Charles Mix County Sheriff to respond to crimes, but will be required to call BIA or YST officers. Moreover, while the race of the perpetrator or victim can affect criminal jurisdiction on reservation lands, the initial response will be by BIA or YST officers since there is no cross deputization in Charles Mix County and

these are reservation lands under *Podhradsky*. An additional problem that surfaces with the post-1948 reservation lands is that very little of the land is contiguous. Consequently, the BIA and YST officers will be required to travel long distances to cover their new jurisdiction. As a practical matter, this renders law enforcement a virtual nullity.

Further, the exact lands which are part of the post-1948 reservation are virtually unknown to law enforcement officers. Consequently, officers will be hampered by making decisions as to the status of the lands from which the emergency call originated prior to responding to the calls. This delay will allow perpetrators to continue their crimes or avoid apprehension. Protection from criminal activity and the punishment for the convicted criminal under *Podhradsky* will be chaotic at best. Furthermore, the hostility between the BIA and YST and the landowners, as discussed herein, will certainly affect the inclination to provide adequate and efficient law enforcement services to the affected lands. This problem was addressed in the *Yankton* case and was part of the basis for the unanimous decision to overrule the Eighth Circuit and the District Court and alleviate the absurdity created by the decisions in those courts.

Regulation of hunting and fishing on the post-1948 reservation lands will also fall to the YST. The YST currently sells separate hunting licenses for tribal and reservation lands and provides enforcement of its hunting regulations. Persons who possess

a YST hunting license will be able to hunt the post-1948 reservation lands regardless of whether the landowner consents to said activity because the license gives them the right of access to these lands. Further, members of the YST are permitted to hunt and fish tribal and reservation lands, including the post-1948 reservation lands, without first obtaining the permission of the landowner. Clearly, the affected landowners will not be able to control who has access to their property for purposes of hunting and fishing. More importantly, it is quite possible that the YST could require a landowner to purchase a YST hunting license to hunt his own land since the property that he owns is reservation under *Podhradsky*.

c) Insurance and marketability issues.

The ability of the YST to have unfettered access and control of the hunting and fishing on the post-1948 reservation lands certainly affects the insurability of the landowner and his property. It is common knowledge that insurance companies rely primarily on risk assessment in order to hedge their position in a transaction and make a profit. In short, the greater the risk, the higher the premium to be charged to an insured. If a landowner cannot control access to his property for purposes of hunting, fishing or other activities, he certainly will be subjected to either increased premiums or cancellation of his insurance coverage. If insurance is unaffordable or unavailable due to risk factors beyond the landowner's control, the landowner will be exposed to personal liability in

the event of an injury as a result of an activity on his property. Further, if he has no insurance, he stands to lose his home, business and other assets in order to satisfy a damage claim.

In light of the post-1948 reservations created by the *Podhradsky* decision, the marketability of the landowners' property will also be adversely affected. This has an impact upon the landowner, or his heirs, if a decision is made to sell the property. It also has an impact on the use of the property for collateral in banking transactions.

Two key elements exist in any sale transaction involving real property. First, the seller wants to be able to market his land based upon what it has to offer prospective purchasers. Second, the purchaser wants to purchase real property that he can use either as a business/investment endeavor or for recreation. Land prices in Charles Mix County have risen dramatically over the past several years, largely due to hunters who desire to secure a place to hunt during South Dakota's excellent hunting seasons. If many people have access to the land for hunting purposes and that access cannot be controlled by the owner of the property, its marketability from a hunting standpoint is reduced if not completely eliminated. If the property cannot be insured due to the unlimited access of others to the property or the control of same by the YST, then the marketability of the property is, once again, severely hampered or completely eliminated. If landowners cannot control the access to their property so as to protect their

crops, livestock and land, the marketability of the property from an agricultural standpoint is substantially reduced as well.

In addition, financial institutions base the amount of a loan upon the value of the collateral. The value of the collateral is based directly upon the ability to sell same in the event of a default on the note. If the marketability of the property is adversely affected due to its status as reservation land, the financial institution will not loan money, or as much money, as it might have otherwise loaned had the reservation impediment not been present.

B. Discriminatory effect of *Podhradsky*.[4]

Under federal and state law CME and RCWD are obligated to refrain from discriminatory rate practices in the operation of their businesses. The entities are permitted to discriminate between classes on their rates, but cannot discriminate within a class. Consequently, the same rate must be charged to a class of consumers, whether Indian or non-Indian, regardless of where the services are provided. Moreover, the ability of the YST to tax the entities and control rates, govern enforcement actions, and, to a certain degree, control other aspects of the operation of

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[4] A detailed discussion of the history and financial obligations of CME is contained in the *Amicus Curiae* Brief of Charles Mix Electric Association, Inc and Rosebud Electric Cooperative, Inc.

utility companies is directly tied to the status of the land. If the issue involving the mini reservations and the post-1948 reservation lands created by *Podhradsky* is not reversed on appeal, it will certainly have a discriminatory effect on the landowners.

Currently, the YST does not have an ordinance governing utilities, but, in light of *Podhradsky*, it is merely a matter of time before such an ordinance will be enacted. Other Indian tribes have already enacted ordinances to regulate utilities and it is clear that a trend has been established among the tribes to enact these ordinances. *See*, *Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at 5, n. 5. The current governing law arguably permits the YST to engage in regulatory actions over CME and RCWD on the mini reservation lands and the post-1948 reservation lands. *See*, *Montana*, 450 U.S. at 544; *Strate v. A-1 Contractors*, 520 U.S. at 438; *Plains Commerce Bank*, 554 U.S. at 316. Consequently, the YST could require the utility provider to charge a lower rate to the Indian person who resides on the mini reservation lands than other consumers who receive the exact same services. Moreover, the YST can govern the termination of services for the Indian consumer on the mini reservation lands under its ordinances and can do so in a fashion that is different in nature and manner than what applies to other utility consumers.

In addition, CME and RCWD have financing for infrastructure and other improvements which are directly tied to their rates. Consequently, if their

rates fall below a certain level, they will be considered in default of their loans and same could be foreclosed or their operations could be taken over by their funding agency. *See, Amicus Curiae* Brief of Charles Mix Electric Association, Inc., and Rosebud Electric Cooperative, Inc., at. 2-5. If the YST requires the utility providers to impose rates on the mini reservation lands that are less than that which are charged to other consumers, then the utility providers will necessarily be required to increase their rates to the other users so that they can meet their obligations under the financial agreements. The net effect is that the Indian consumers who reside on the mini reservation lands will enjoy an inordinately low utility rate while the other users' utility rates will skyrocket. This affects all of the CME and RCWD consumers and not simply the consumers who reside in the area affected by *Podhradsky*.

In addition to the above, the Wagner School District is situated on post-1948 reservation land. The school has in place certain disciplinary measures and other rules and regulations to govern not only the students at its facilities, but the staff as well. Since the school facilities are now located on a reservation under *Podhradsky* the complexion of the discipline and other controls at the Wagner School System will change dramatically. Clearly, non-Indian students will be treated differently than Indian students in light of the jurisdictional issues associated with reservation lands. The landowners will now be in a position where not only will their businesses, property

rights and other interests be directly affected by the *Podhradsky* decision, but also their children's lives will be dramatically, and perhaps adversely, impacted in an educational setting.

C. Conflicts of the decisions.

The Petitions for Writ Certiorari submitted by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District clearly set forth the conflicts which exist with the *Podhradsky* decision and other decisions rendered by the South Dakota Supreme Court, the Eighth Circuit, and this Court. *Podhradsky* is in direct conflict with at least two South Dakota Supreme Court cases. *See, State v. Greger*, 559 N.W.2d 854 (S.D. 1997) and *Bruguier*, 599 N.W.2d at 364. Moreover, *Podhradsky* leaves a clear conflict with the decisions rendered by the Eighth Circuit as well. In the first instance, if the language in *Podhradsky* were eliminated regarding the affected non-Indian landowners who acquired their property post-1948, there would be no conflict with *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), nor with the recent decision in *Yankton Sioux Tribe v. United States Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), but there would remain a conflict as a result of the creation of reservations regarding the lands held in trust. On the other hand, if *Podhradsky* stands, it will clearly be in conflict with the *Gaffey* and the *Corps of Engineers* decisions with reference to the post-1948 lands as well as the trust lands.

The *Podhradsky* decision is also in conflict with this Court's decisions in *Yankton* and in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), with regard to a number of issues, but primarily in reference to the extinguishment of the boundaries of the 1858 YST reservation. This Court declined to fully resolve the boundary issue in *Yankton*. That issue is now ripe and should be decided by this Court.

CONCLUSION

The *amicus curiae* landowners request the United States Supreme Court grant the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District.

Dated this 21st day of February, 2011.

Respectfully submitted,

TIMOTHY R. WHALEN
WHALEN LAW OFFICE, P.C.
301 Main Street
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
Email: whalawtim@cme.coop

Attorney for Amicus Curiae Colin Soukup, representing the Frank Soukup Family Limited Partnership, and Dan Cimpl

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Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 22 2011
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In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RANDALL COMMUNITY WATER DISTRICT, *AMICUS CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

BRADLEY D KERNER
KERNER LAW OFFICE
PO Box 371
Armour, SD 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd com
Attorney for amicus curiae
Randall Community
Water District

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

In October 1976, the Randall Community Water District was incorporated under the laws of the State of South Dakota. South Dakota Codified Laws § 46A-9 (SDCL). The stated purpose of the Randall Community Water District was to pump, treat, and distribute potable water to rural customers and rural communities in several South Dakota counties. To date, the Randall Community Water District includes all of Charles Mix County and all of Douglas County, as well as portions of Aurora County, Bon Homme County, Brule County and Hutchinson County, all in central and southeastern South Dakota.

The local communities that are served in these counties include Armour, Aurora-Brule Rural Water System Inc., Corsica, Davison Rural Water System Inc., Delmont, Geddes, Lake Andes, Pickstown, Platte and Wagner. Native Americans live throughout this area and have individual accounts, as well as bulk users' accounts, with the Randall Community Water District.

In 2010, the total sales for the Randall Community Water District was 955,000,000 gallons. Native

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amicus curiae* made monetary contributions and funded the preparation and submission of this brief.

American individuals (180 individual accounts) and Native American bulk users (5 bulk users' accounts) purchased a total of 59,000,000 gallons.[2] In all, this is approximately six percent of the total sales of the Randall Community Water District.

To serve the total area, Randall Community Water District has 1,766 miles of pipeline. The 2010 compliance review required by the United States Department of Agriculture confirms that the total population served in the area is 13,119 individuals, with a total Indian population of 2,679 individuals. Approximately 240 miles of pipeline are within the contested area. United States Department of Agriculture Form RD 400-8 (Compliance Review) dated April 1, 2010.

1. The future of the Randall Community Water District is tied to dependable revenue sources to cover the cost of production and related expenses. Rates are established and that rate is maintained for all accounts served. In addition, rates need to be increased periodically as costs increase. Again, these increases apply to all accounts served, including tribal and individual Indian accounts.

Jurisdiction within the limits of an Indian reservation is extremely complicated. To date, Randall Community Water District has not been substantially

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[2] These bulk users include Greenwood, Marty, North Wagner Housing, Ft Randall Casino and Yankton Sioux Tribe Truck Plaza

impacted by tribal jurisdiction or the absence of state jurisdiction because the area has not been considered to be within the limits of an Indian reservation by state law. The decision of the court of appeals recognizes a sizable noncontiguous Indian reservation in this area consisting of all trust lands and arguably including hundreds of thousands of acres of fee lands. That recognition poses a real problem for the stability of this Water District.

2. The Randall Community Water District is entirely dependent on statutorily conferred powers. For example, the Water District operates within right-of-way easements. The entire process involved in right-of-way easements will be impacted by the court of appeals decision, placing reservation boundaries around all trust lands and an unknown amount of additional fee lands.

Because the decision of the court of appeals recognizes an Indian reservation that was purportedly established by Congress years ago, the effect of that reservation status on existing easements is unknown. Moreover, reservation status will affect the process for future easements needed for service and growth in the Randall Community Water District.

3. Similarly, powers of eminent domain set forth in SDCL 46-9-51 will be impacted by reservation status. Competing claims in this area of the law are unclear within Indian reservations.

4. The regulatory claims of tribal governments are also enhanced by the decision of the court of appeals.

The Randall Community Water District shares the concern noted in the *amicus curiae* Brief of Charles Mix County Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of the Petitions for Writ of Certiorari in this case. As the excerpts in the tribal code in Appendix A of that *amicus curiae* brief attest, similar regulatory claims in the Yankton area tied to reservation status will present an almost insurmountable problem for entities like the Randall Community Water District.

ARGUMENT

The Randall Community Water District would submit that expertise in Indian law is not needed to see what is wrong in this litigation. That is, namely, the failure of the lower courts to give proper weight to the almost "insurmountable presumption of disestablishment" previously established by the Court that should have controlled this case from the beginning. The first time, the district court resurrected 1858 reservation boundaries long deemed disestablished. The second time, the district court still recognized 1858 reservation boundaries despite the opinion of this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The third time, the district court parlayed a one thousand acre reservation mistakenly recognized by the court of appeals into a new 37,000 acre reservation, again contrary to the presumption set forth in *Yankton Sioux Tribe*, 522 U.S. at 344-345.

Neither the lower courts nor the parties should have been free to slight the disestablishment presumption.

As Charles Mix County noted in the County's Petition, it bears repeating that in oral argument, this Court *stressed* the controlling nature of this presumption.

> Tribe: The cession and the sum certain language . . . it's just *boilerplate* . . .
>
> Court: But this Court has said it's nearly *irrebuttable*.
>
> Court: That's what *Solem* said.
>
> Tribe: No . . . I say the presumption is that the Indians *retain* the reservation and it's up to the State to rebut
>
> Court: But then you must, mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent" . . .
>
> Court: If we're faced with something . . . almost irrebuttable . . . why does the part that's uncertain dominate what we have said is a *very strong presumption*?

Transcript of Oral Argument at 37, 38, 39, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) (emphasis added).

This strong presumption of disestablishment constitutes the rule of law in this case and every

other case like it. That is the function of a presumption. The failure of the lower courts to properly deal with this presumption is worthy of the attention of this Court.

Instead of relying primarily on the presumption of disestablishment and text of the agreement, the court of appeals used "context" as its source of treaty interpretation, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000). Relying on the divided opinion of this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), dealing with general treaty language, the court of appeals ignored *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the presumption of disestablishment recognized since *DeCoteau*, and found that "similar treaty language does not necessarily have the same effect when dealing with separate agreements." *Gaffey*, 188 F.3d at 1020. In fact, to the court of appeals the "cession and sum certain" language meant virtually nothing, as did the near *identity* of the agreements, not to mention the presumption. The court of appeals, in practical terms, regarded the Yankton Agreement as a blank slate to be filled in with whatever evidence of historical "context" it determined to be persuasive. There are several reasons why the approach of the court of appeals is fundamentally impermissible and fundamentally incorrect.

First, *Mille Lacs* is simply not applicable. *Mille Lacs* addresses an argument that claimed that when

general treaty language had been used in a 1901 agreement with a tribe on the west coast and had been interpreted in a certain way, it must have the same meaning as "similar" language in an agreement a half century earlier in Wisconsin, despite other facts to the conrary. That is *Mille Lacs*.

In this case, this Court has unanimously and unambiguously interpreted the meaning of the "cession" and "sum certain" language, first in *DeCoteau* and then in the case of the Yankton Agreement itself. *Yankton Sioux Tribe*, 522 U.S. at 344. Regardless of how *Mille Lacs* might be interpreted in a context in which this Court has not already ruled on the meaning of general treaty language, *Mille Lacs* has no application in a situation in which the Court has ruled on the meaning of language of the very agreement at issue. The approach of the court of appeals makes the emphatic language of this Court in *Yankton Sioux Tribe* mere *obiter dictum*, surely an egregiously erroneous use of *Mille Lacs*.

Second, the "cession and sum certain" language does, in fact, have a well established meaning in Indian law, unlike the more general language construed in *Mille Lacs*. This Court has emphasized its importance when finding disestablishment, as in *DeCoteau v. District County Court*, 420 U.S. at 445, and has emphasized its absence when declining to find disestablishment. This Court found an agreement lacking "cession and sum certain" to "stand in sharp contrast to the explicit language of cession employed in the Lake Traverse and the 1904 Rosebud

Acts." *Solem v. Bartlett*, 465 U.S. 463, 473 (1984). *See also, Hagen v. Utah*, 510 U.S. 399, 411-412 (1994).

Third, the appropriate mode of construction of the Yankton Agreement has already been set by this Court. *Yankton Sioux Tribe* indicated that although Congressional intent was perceptible from the "plain statutory language" it would also take "note of the contemporary historical context, subsequent congressional administrative references to the reservation and demographic trends." *Yankton Sioux Tribe*, 522 U.S. at 351. Thus, *Yankton Sioux Tribe* stands as an insurmountable barrier to discarding the meaning of the "plain statutory language." Rather, the language has primacy and the additional factors can be examined in addition to the language.

It has been twelve years since the decision of this Court in *Yankton Sioux Tribe*. At one point, the federal district court did not schedule a hearing for four years. No other case decided by this Court has required a process like this to decide whether an area is inside an Indian reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The nearly irrebuttable presumption of disestablishment should have effectively precluded the bizarre nature of the litigation in this case.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

BRADLEY D. KERNER
KERNER LAW OFFICE
PO Box 371
Armour, South Dakota 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd.com
Attorney for amicus curiae
Randall Community
Water District

(3) (3) (4)

Nos. 10-929/10-931/10-932

FEB 22 2011

In The

Supreme Court of the United States

DENNIS DAUGAARD,
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PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF WAGNER COMMUNITY SCHOOL DISTRICT NO. 11-4 IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

SCOTT J. PODHRADSKY
107 South Main
PO Box 370
Wagner, South Dakota 57380
Telephone (605) 384 5471
Email law@podhradsky.com
Attorney for Amicus Curiae
Wagner Community School District No 11-4

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Pursuant to Supreme Court Rule 37(2), Wagner Community School District No. 11-4, of Wagner, South Dakota, hereby respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICUS* SCHOOL[1]

Wagner Community School District No. 11-4 ("School" herein) owns real property which is a part of the approximately 8,000 acres of fee property that are directly affected by the decision rendered by the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. Counsel of record for the school is an associate in a law firm that has represented the school and Southern Missouri Waste Management for years. Southern Missouri Waste Management District is a party in this case. Counsel authored the brief in Southern Missouri Waste Management in whole or in part. Counsel is not counsel of record for Southern Missouri Waste Management. Charles Mix County is a rural area with more legal problems than lawyers. With this acknowledgement, counsel submits that this brief is in substantial compliance with Supreme Court Rule 37(6). No counsel or party made a monetary contribution intended to fund the preparation or submission of this *amicus curiae* brief for the School and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution.

2009), as amended by *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). The Wagner School is located on part of this fee property. This fee property is within the city limits of Wagner. In its original (2009) decision, the Eighth Circuit Court of Appeals in dicta opined that after the enactment of 18 USC § 1151 in 1948, allotted land to which the Indian title has been extinguished still retained its status as Indian land. Prior to the enactment of § 1151, the settled law held that when allotted land passed to a non-Indian, the land was no longer considered Indian country. *See* 18 USC § 1151(c). However, in its 2009 decision, the court indicated that after the passage of § 1151 allotted lands sold to non-Indians still retained its Indian country status as a "reservation" under 18 USC § 1151(a).

ARGUMENT

1. The Wagner Community School District No. 11-4, hereinafter referred to as School, is a community school educating children from kindergarten through twelfth grade. The 225,000 square foot structure is situated on an 78.77 acre parcel of land located in the city limits on the western side of the City of Wagner, Charles Mix County, South Dakota. App. 1 *infra*, is an aerial view of the School's fee property, an isolated, non-contiguous tract of fee land that the panel placed within the limits of the Yankton Sioux Reservation. The school building contains numerous classrooms, laboratory rooms, a library,

auditorium with stage, shop rooms, two gymnasiums, a cafeteria, a swimming pool, administrative offices and utility rooms. It has a value in excess of fifteen million dollars and employs 155 people. Total student population is 777 with 391 of those being Indian and 386 being non-Indian. Also contained on the property is an outdoor football/track stadium along with two baseball fields and parking areas. The school also provides early learning services to children ages three and four, with approximate enrollment of 94 Indians and 40 non-Indians. The legal description of the property is Lot Four (4) and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) less Lot H-1 in Lot 4, all in Section Four (4), Township Ninety-Five (95) North, Range Sixty-Three (63) West of the Fifth Principal Meridian, Charles Mix County, South Dakota, containing 78.77 acres, more or less. Lot H-1 of Lot 4 is occupied by the Wagner Fire Protection District, a political subdivision.

2. The panel decision conflicts with decisions of this Court and of the court of appeals and consideration by this Court is therefore necessary. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (YST), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975), *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), *United States v. Provost*, 237 F.3d 934 (8th Cir. 2001) (former Yankton allotted

lands not reservation), and most recently *YST v. U.S. Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010). The panel decision also conflicts with decisions of this Court and the court of appeals that have construed the General Allotment Act of 1887 (24 Stat. 388 (1887)).

3. This proceeding involves several questions of exceptional importance. The panel decision presents a question of exceptional importance because it squarely conflicts with a long line of *YST* decisions of the South Dakota Supreme Court (cited favorably by this Court in *YST* at 342, n.4), including *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). *See also State ex rel. Hollow Horn Bear*, 95 N.W.2d 181 (1959) and *Bruguier v. Class*, 599 N.W.2d 364, 371 (S.D. 1999) ("congressionally terminated"). The panel decision conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue. *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981); *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965).

4. The panel again affirmed the district court. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009). Incredibly, the panel, on its own notion, also incorrectly added over another 8,000 acres of noncontiguous *non-Indian fee land* to this unprecedented reservation because of a misreading of the generic Indian country statute, 18 USC § 1151, (that never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act).

In the process, no one was even given an opportunity to brief the 18 USC § 1151(a) reservation status of this fee land: not the State, not the County, not the United States, not the Tribe, and most importantly, not the landowners, with lives and property impacted ("within the limits" of a reservation), without *any* notice. This unprecedented holding was the direct result of the district court and the panel continuing to ignore the very strong presumption of diminishment/disestablishment. A subsequent Order on rehearing removed this language from the panel opinion. However, the practical consequences of the Order are unclear. *See* State Brief 4-5, 13-16, 34-35.

This Court should authoritatively resolve the post 1948 fee land issue. First, as the State has pointed out, the Order deleting the post 1948 fee land footnote is just a short term fix. The rationale for including post 1948 fee lands with 18 USC § 1151(a) reservation boundaries has not been completely withdrawn from the panel's opinion. As a result, the text of the panel opinion will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 USC § 1151(a) reservation. Secondly, post 1948 fee land expressly conflicts with the allotments in fee holding in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir.), *cert. denied*, 530 U.S. 1261 (2000).

Another portion of the panel's opinion also merits attention. The panel recognizes reservation boundaries around all Indian allotments still held in trust. This holding also conflicts with allotment/fee holding

in *Gaffey*, and conflicts as well with the recent *Corps* case that expressly adopted this aspect of *Gaffey* as the holding in the *Corps* case. If the panel is correct that all allotments now held in trust are encompassed in 18 USC § 1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that allotments, now in fee, are not within 18 USC § 1151(a) reservation boundaries. In other words, 18 USC § 1151(a) boundaries do not automatically disappear just because a fee patent is issued. And 18 USC § 1151(a) reservation boundaries are not automatically resurrected because dicta in an opinion is taken out of context by the panel.

Congress has a role in this reservation boundary process that the court of appeals has not respected. Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the Yankton Act (which disestablished the 1858 reservation boundaries). If any allotments were within an 18 USC § 1151(a) boundary at any time after the proclamation in the Yankton Act, *Gaffey* was wrongly decided. This conflict should be resolved. All of this confusion could have been avoided if the panel would have appropriately deferred to a century of precedent in the State of South Dakota. Clearly, South Dakota opinions are entitled to more respect than they received in any of the panel's decisions. Along these lines the panel should have accorded this Court's treatment of the South Dakota opinions more respect.

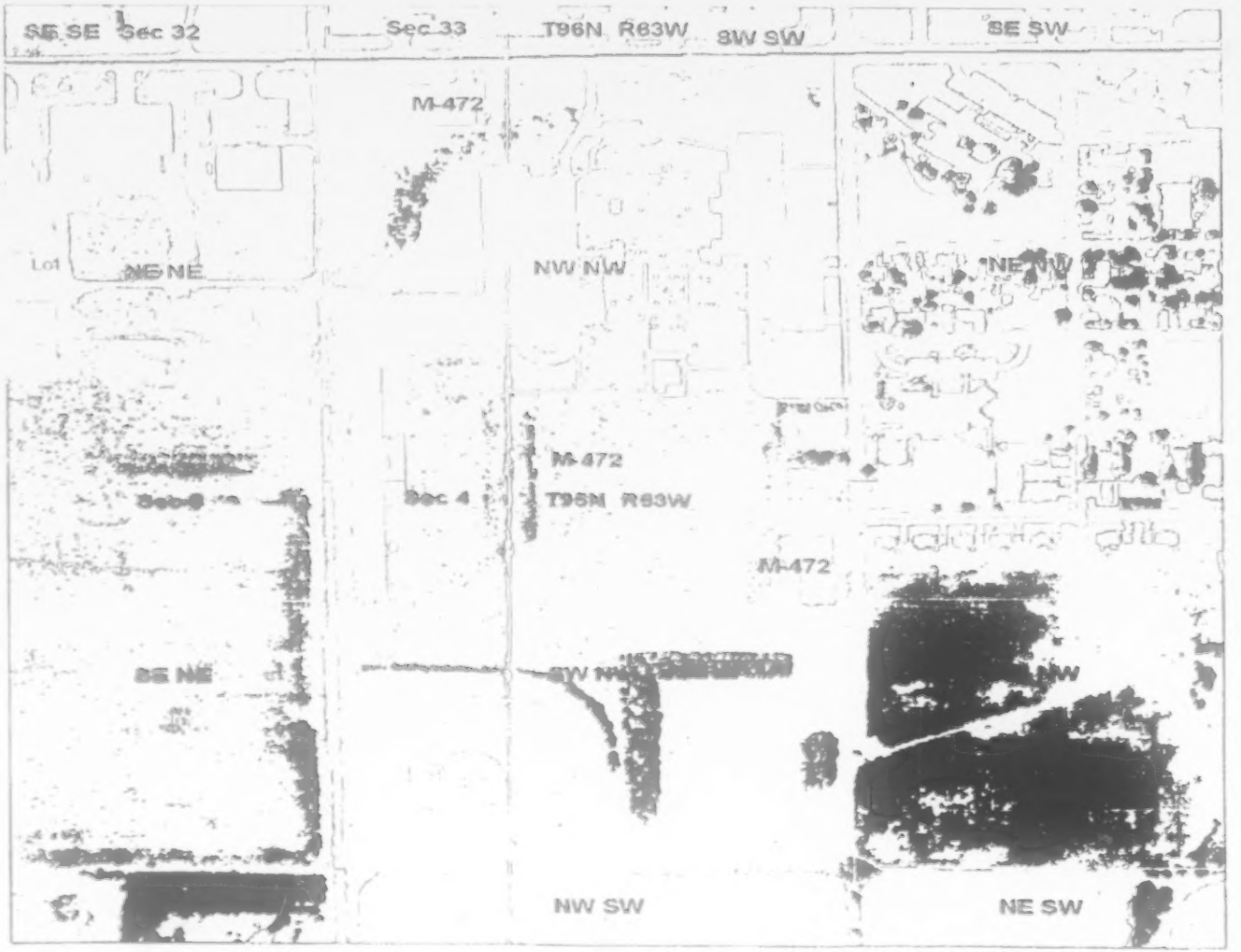
CONCLUSION

The decision of the court of appeals conflicts with the decision of the State Supreme Court in *Bruguier*. It also appears that there exists conflicting published opinions in the Eighth Circuit as to whether any allotted lands in Charles Mix County have reservation boundaries around them. It appears that *Podhradsky II* in part reverses *Gaffey II*.

Respectfully submitted,

SCOTT J. PODHRADSKY
P.O. Box 370
Wagner, SD 57380
(605) 384-5471

App. 1



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